Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

(1)

No.

In The
SUPREME COURT OF THE UNITED STATES

October Term, 1997

JAMES HAWTHORNE, Petitioner

VS.

UNIVERSITY OF WEST FLORIDA, Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES OF APPEALS, ELEVENTH CIRCUIT COURT

PETITION FOR WRIT OF CERTIORARI

James E. Hawthorne, Pro-Se
P.O. Box 9556
Pensacola, FL 32513
Tel: wk.(850) 469-0921, Hm. (850) 433-5520

69 pp

QUESTIONS PRESENTED

1. Is the Court in error granting Summary Judgment when a Rule 60 Motion under the Rules of Civil Procedure is filed; when neglect, newly discovered evidence, and fraud come into play after summary judgment was entered?

2. Does the rule, law or statute of ineffective assistance of counsel under the 6th Amendment apply to a paid attorney, as well as one appointed by the courts - both state and federal?

LIST OF PARTIES

In accordance with Rule 14, Rules of the United States Supreme Court, the undersigned Pro-Se Counsel Petitioner certifies that the following parties have an interest in the outcome of this case;

Petitioner	James E. Hawthorne
Respondent(s)	Barbara D. Auger, Esq. Pennington, Culpepper, Moore, Wilkinson, Dunbar and Dunlap Attorneys at Law 2nd Floor 215 South Monroe Street Post Office Box 10095 Tallahassee, Florida 32302-2095
The Honorable	Roger Vinson, United States District Judge Northern District, Pensacola Division
The Honorable	Susan M. Novotny, United States District Judge Magistrate Northern District, Pensacola Division
The Honorable	Tjoflat, Cox and Carnes, United States

	Circuit Judges United States Court of Appeals Eleventh Circuit Court
UWF Personnel	Ms. Rosalind Fisher, Director Office of Human Resources Mr. John Martin, VP Mr. Earl Smith, Director of Phy. Plant Mr. Dan Simpler, Director, Building Services Ms. Rachel Booker, Custodial Supervisor The UWF Staff and Employees as a whole because of the public interest this has created.
Parents of Petitioner:	Mr. and Mrs. N. Hawthorne, 412 E. Strong Street Pensacola, FL 32501

TABLE OF CONTENTS

Questions Presented	i.
List of Parties	ii.-iii.
Table of Contents	iv.
Index to Appendices	v.
Table of Authorities	vi. -vii
Jurisdiction	viii.
Constitutional and Statutory Provisions Involved	1.
Statement of the Case	6.
Reasons for Granting the Petition	16.
Conclusion	19.
Proof of Service	20.

INDEX TO APPENDICES

Appendix A	Summary Judgment is Granted
Appendix B	Notice of Appeal
Appendix C	Affirmed: Decision of Appeal Court
Appendix D	Petitions for Rehearing are Denied
Appendix E	1st Extension of Time is Granted
Appendix F	2nd Extension of Time is Granted
Appendix G	Attorney Suspended from Practice of Law, by the Supreme Court of Florida
Appendix H	Conditional Guilty Plea from Attorney to the Supreme Court of Florida on April 15, 1998 of Misrepresentation of the Petitioner
Appendix I	Rules of Civil Procedure, Rule 60
Appendix J	Ineffective Assistance of Counsel

TABLE OF AUTHORITIES

CASES

American Viking Contractors, Inc. v. Scribner Equipment Co., Inc.,
745 F.2d 1365 (11th Cir. 1984). 1

Celotex Corp. v. Catrett, 477 U.S. 317, 106, S.Ct. 1548, 91 L. Ed. 2d 265 (1986) 1,8

Adickes v. S.H. Kress & Co., 398 U.S. 144, 157, 90 S. Ct. 1598, 1608, 26 L.Ed. 2d 152 (1970) 1

K.D. Enterprises, v. AM Hardware Mutual Ins. Co., 655 f.2d 598, 602 (5th Cir. 1981) 1

Impossible Electronics Techniques, Inc. v. Wackenhut Protective System, Inc. 669 F.2d 1027, 1031 (5th Cir. Unit B 1982) 1

Mercantile Bank and Trust Co., v. Fidelity & Deposit Co., 750 F.2d 838, 841, ·11th Cir. 1985). 2

Rogers v. Evans, 792 F.2d 1052, 1059 [11th Cir. 1986] 2

Title VII of the Civil Rights Act of 1964 [42 U.S.C. - 2000e seq.] 2

U.S.C.A. Const. Amend. 14-1 P.168 3,4

Rochin v. People of Cal. [1952] 72 S.Ct. 205, 242 U.S. 165, 96 L. Ed 183, 25 A.L.R. 2d 1396 4

Employment Discrimination, under Title VII, of Civil Rights Act of 1964 [42 U.S.C. - 2000e, et seq.] 7

Rule 56(c), Fed. R. Civ. P 8

Everett v. Napper, 833 F.2d 1507, 1510 (11th Cir. 1987) 8

Cornelius v. Highland Lake, 880 f.2d 348, 351 (11th Cir. 1989)
494 U.S. 1066, 110 S. Ct. 1784, 108 L. Ed. 2d 785 (1990) 8

Anderson v. Liberty Lobby, Inc. 477 U.S. 242, 248 106 S. Ct. 2505, 2510, 91 L.Ed. 2d 202, 211 (1986) 9

Matsushita Electric Indus. Co. v. Zenith Radio Corp. 475 U.S. 574, 586, 106 S. Ct. 1348, 1356, 89 L. Ed. 2d 538, 552 (1986) 9,10

Carter v. Miami, 870 F.2d 578, 585 (11th Cir. 1989) 9

Ramsey v. Leath, 706 f.2d 1166, 1170 (11th Cir. 1983) 9

McCabe v. Sharett, 12 F.3d 155d, 1560 (11th Cir. 1994) 10

Advanced Estimating System, Inc. v. Riney, 77 f.3d 1322, 1324 (11th Cir. 1996) 9

Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. Partnership, 507 U.S. 380, 113 S.Ct. 1489, 123 L.Ed. 2d (1993) 12

Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984) 14

STATUTES AND RULES

Rule 60,(b)(1),(2) & (3) The Rules of Civil Procedure 5,10,11, 13,15

JURISDICTION

The jurisdiction of this Court is invoked under 18 U.S.C. 1254(i), that the date in which the United States Court of Appeals decided this case was October 31, 1997 (affirmed).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In reviewing a decision for consideration upon the District Court granting summary judgment to the moving party, Respondents. The Appellate Court applies the same legal standard as those which control the District Court in determining whether the judgment is appropriate, American Viking Contractors, Inc. v. Scribner Equipment Co., Inc., 745 F.2d 1365 (11th Cir. 1984). You evaluate whether the moving party has met its burden of showing that there is no genuine issue of material facts, and that the moving party is entitled to a judgment as a matter of law F.R.C.P. 56 Celotex Corp. v. Catrett, 477 U.S. 317, 106, S.Ct. 1548, 91 L. Ed. 2d 265 (1986) in determining whether a movant has met this burden you must review the evidence and all factual inferences therein in the light most favorable to the party opposing the judgment. Adickes v. S.H. Kress & Co., 398 U.S. 144, 157, 90 S. Ct. 1598, 1608, 26 L.Ed. 2d 152

(1970) as this court said:

> "All reasonable doubts about the facts are resolved in favor of the non-movant, K.D. Enterprises, v. AM Hardware Mutual Ins. Co., 655 f.2d 598, 602 (5th Cir. 1981). If reasonable minds might differ on the inferences arising from undisputed facts, then a court should deny judgment. Impossible Electronics Techniques, Inc. v. Wackenhut Protective System, Inc. 669 F.2d 1027, 1031 (5th Cir. Unit B 1982)...Mercantile Bank and Trust Co., v. Fidelity & Deposit Co., 750 F.2d 838, 841, ·11th Cir. 1985)."

Moreover, this Court has said:

"Ordinarily...Judgment should not be granted in cases where motive, intent, subjective feeling, and reactions are to be searched..."

Rogers v. Evans, 792 F.2d 1052, 1059 [11th Cir. 1986].

Here the case before this High Bench Petitioner, James E. Hawthorne, declares this complaint "Employment Discrimination" pursuant to Title VII of the Civil Rights Act of 1964 [42 U.S.C. - 2000e seq.] is with merit, and that his constitutional rights have been violated and that the Summary Judgment in a Civil case, (this case) 95-30274-RV

dated October 22, 1996 should not have been granted.

The judgment entered by the District Court is truly in conflict with the 11th Cir. Court, and the cases cited above. That as far back as July 28, 1868, pursuant to the fifth Article of the Constitution, The Fourteenth Amendment was ratified. Then and now the Fourteenth Amendment to the Federal Constitution operates to prevent arbitrary and oppressive State action that adversely affect Liberty rights of any person. Consistent with requirements of due process comes these fundamental principles set forth:

Section 1, Due Process of Law...nor shall any state deprive any person of...Liberty...without due process of law...U.S.C.A. Const. Amend. 14-1 P.168. Petitioner in reviewing the state's action under a claim of rights guaranteed by Due Process clause of this amendment (Equal Protection)...Federal Courts may not draw on merely personal and private notions and disregard the limits that bind judges in

their judicial function, and even though the concept of Due Process of law is not final and fixed, these limits are derived from considerations that are fused in the whole nature of Judicial Process; and these are considerations deeply rooted in reason and in compelling tradition of the legal profession. As cited in Rochin v. People of Cal. [1952] 72 S.Ct. 205, 242 U.S. 165, 96 L. Ed 183, 25 A.L.R. 2d 1396; thus; U.S.C.A. Const. Amend. 13-14, P. 925 B, 1255e, ...Judicial review of the guarantee of...impose on Federal Court...an exercise of judgment upon the whole course of proceeding...Hawthorne v. University of West Florida, etal....to ascertain whether Respondents offered those canons of decency and fairness which express the notions of Justice of English speaking peoples.

The Petitioner claims a denial of rights guarantee under the Federal Constitution, and that his case may be determined under Federal Constitutional Law. That courts power to resolve this conflict is expressly given by the Constitution in Article 1,

Section 8, Clause 18.

Applying the standards and cases cited, you must reverse the District Court's Summary Judgment in favor of the non-Movant, and grant the relief requested in the Title VII complaint, and the motion under F.R.C.P. Rule 60 to vacate summary judgment.

STATEMENT OF CASE

Petitioner James E. Hawthorne was discharged from his employment after eleven years at the University of West Florida. During his first 10 years he had never received any suspensions. In 1991, he inquired into and about discrimination among employees as well as himself. After this, he started being retaliated against. He was suspended three times in one month, after working for ten years without any suspensions. The attorney of the Respondent took a deposition of the Petitioner's supervisor Rachel Booker where she stated that once the Petitioner started going to Personnel and looking into employees' personnel files concerning their education, the Director of the Physical Plant, Dan Simpler had her and supervisor Don Williams retaliate against the Petitioner. Ms. Booker also stated that she went home crying for what she was forced to do to Petitioner and "all I did was what she was told to do...because of my job - my jeopardy."

On March 13, 1992, he was terminated from his

job. The reason given for his termination from the Personnel Director, Ms. Rosalind Fisher, was that he was in violation of the University's policy of unauthorized use of state property (by using the telephone).

A complaint was filed with the EEOC in Miami, Florida (see copy in Court records). On May 23, 1995, the Petitioner received from the EEOC Division a letter giving him the right to address his case in the Federal Court and giving the Petitioner 30 days from the date of the letter.

That on June 19, 1995, the Appellant filed his complaint under Employment Discrimination, under Title VII, of Civil Rights Act of 1964 [42 U.S.C. - 2000e, et seq.].

On October 22, 1996, the District Court granted Summary Judgment to the the Respondents stating that there are "no genuine issues of material facts."

A motion for summary judgment should be granted when "the pleadings, depositions, answers to interrogatories, and admission on file, together with

the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Rule 56(c), Fed. R. Civ. P. "The plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. St. 2548, 2552, 91 L. Ed. 2d 265, 273 (1986). See Everett v. Napper, 833 F.2d 1507, 1510 (11th Cir. 1987).

However, summary judgment is improper "if a reasonable fact finder could draw more than one inference from the facts, and that inference creates a genuine issue of material fact." Cornelius v. Highland Lake, 880 f.2d 348, 351 (11th Cir. 1989), cert. denied, 494 U.S. 1066, 110 S. Ct. 1784, 108 L. Ed. 2d 785 (1990). An issue of fact is "material" if it

might affect the outcome of the case under the governing law. Anderson v. Liberty Lobby, Inc. 477 U.S. 242, 248 106 S. Ct. 2505, 2510, 91 L.Ed. 2d 202, 211 (1986). It is "genuine" if the record taken as a whole could lead a rational trier of fact to find for the non-moving party. Id. See also Matsushita Electric Indus. Co. v. Zenith Radio Corp. 475 U.S. 574, 586, 106 S. Ct. 1348, 1356, 89 L. Ed. 2d 538, 552 (1986).

Conclusively, allegations based on speculation, subjective beliefs, or bald assertions based upon unsubstantiated hearsay are insufficient to create a "genuine issue of material fact." Carter v. Miami, 870 F.2d 578, 585 (11th Cir. 1989); Ramsey v. Leath, 706 f.2d 1166, 1170 (11th Cir. 1983). Here, in this case, there are no conclusory allegations based on speculation, subjective beliefs, or bald assertions based upon unsubstantiated hearsay. The Petitioner has submitted sufficient evidence on record in both the District Court and the Appeals Court to substantiate that there is genuine issue of

material facts. On the other hand, if the record taken as a whole could lead a rational trier of fact to find for the nonmoving party, then the issue of fact is genuine.

Matsushita Electric Indus. Co. v. Zenith Radio Corp. 475 U.S. 574, 586, 106 S. Ct. 1348, 1356, 89 L. Ed. 2d 538, 552 (1986). On a summary judgment motion, the record and all reasonable inferences that can be drawn from it must be viewed in the light most favorable to the nonmoving party. McCabe v. Sharett, 12 F.3d 155d, 1560 (11th Cir. 1994).

Based on the volume of record evidence and cited case law, the District Court erred in granted summary judgment to the Respondents.

1. Is the Court in error granting Summary Judgment when a Rule 60 Motion under the Rules of Civil Procedure is filed; when neglect, newly discovered evidence, and fraud come into play after summary judgment was entered?

That on February 24, 1997, the Petitioner filed

in the United States District, Northern District, Pensacola Division, motion under Fed. R. Civ. P. Rule 60, Motion Under Fed. Rules of Civ. Pro. (See Appendix I. A copy of the motion was forwarded to the Appeals Court along with a motion to stay the appeal until a ruling was made by the District Court on March 1, 1997.

On March 13, 1997, the District Court denied the motion under Fed. Rules Civil P., Rule 60 by the Honorable Roger Vinson, U.S. District Judge. The Petitioner notified the Appeals Court by telephone and followed with a copy of the order denying the Rule 60 Motion to the Court of Appeals Atlanta, GA.

The Petitioner filed a motion under the Federal Rules of Civ. Pro. 60(b)(1) seeking to vacate the summary judgment based on alleged neglect, ineffective assistance of counsel and fraud, based on his attorney's negligence and therefore relief under Rule 60 states that a court may relieve a party from

final judgment for the following reasons: "mistake, inadvertence, surprise or excusable neglect". Fed. R. Civ. Pro 60 (b)(1)(1996). The Supreme Court uses "a flexible analysis" when determining if an action falls within the definition of "excusable neglect." Advanced Estimating System, Inc. v. Riney, 77 f.3d 1322, 1324 (11th Cir. 1996) (citing Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. Partnership, 507 U.S. 380, 113 S.Ct. 1489, 123 L.Ed. 2d (1993). In Pioneer, the Court stated "Congress plainly contemplated that the courts would be permitted, [when] appropriate to accept late filings caused by inadvertence, mistake, or carelessness, as well as by intervening circumstances beyond the party's control." Id.

In this current action, it was a complete surprise when the Petitioner found out that his retained attorney had failed to file motions on a timely manner with the District Court, and later upon an inquiry to the Florida Bar found out that

his attorney of record had been admonished by the Florida Bar and still had cases pending based on the same neglect, non-representation, and ineffective assistance of counsel, that she showed toward this Petitioner.

It would be unlikely that any Court in the United States would not have ruled in favor of Rule 60 (b)(1) where there has been a tremendous showing of unexcusable negligence shown on the part of a licensed certified attorney to practice law in the State of Florida, or in fact, in any state within the United States. Based on the Federal Rules of Civil Procedure, Rule 60 the words described in Rule 60 "mistake, inadvertence, surprise or excusable neglect", has a true meaning when related to this action of the Petitioner's case. And therefore, the District Court did in fact err in not granting the Petitioner's motion to vacate summary judgment under Rule 60 (b)(1).

Therefore the writ of certiorari should be granted to

vacate summary judgment and allow the Petitioner his rightful day in Court.

2. Does the rules, law and statutes of Ineffective Assistance of Counsel apply to a paid attorney, as well as one appointed by the courts - both state and federal?

The Sixth Amendment to the United States Constitution guarantees the right to effective assistance of counsel in all criminal prosecutions. The Supreme Court in Strickland v. Washingt n, 466 U.S. 668, 104 S. Ct. 2052 (1984), established a two prong test to evaluated ineffective assistance claiming: (1) that counsel's performance fell below an objective standard of reasonableness and (2) that counsel's deficient performance prejudiced the defendant resulting in an unreliable or fundamentally unfair outcome of the proceedings. The Court has held that the second prong in Strickland requires more than a showing that the outcome of the proceeding would have been different but for counsel's error.

If, taking the same two prong test as in Strickland and apply it to this case at bar, James Hawthorne v. University of West Florida, and that the AttorneyStewart admits before the Supreme Court of Florida that she has violated the rules, (See Appendix: H,) Page 4 of 23, 5 of 23, 6 of 23, 7 of 23, and 8 of 23 shows that both of the two prong test in Strickland would apply in this case under Ineffective Assistance of Counsel. That the Rule 60 (b)(1)(2) and (3) make the second question presented, void the Summary Judgment. (See Appendix J).

REASONS FOR GRANTING THE PETITION

In this instant proceeding at bar many irregularities interplayed that became harmful to this Petitioner as he sought to have his case aired and heard in both the United States District Court, Northern District of Florida, Pensacola Division, and the Eleventh Circuit Court of Appeals. A number of these irregularities consisted of violations of procedural and substantive law; others were violative of the constitutional process itself, as when the customary rules of the game are shielded and obscured from the Petitioner, the whole concept of legal jurisprudence is no less than tainted with impropriety that the entire judicial system would thusly lose its "raison d'etre."

The Petitioner in this cause is a Pro-Se litigant, who is unschooled and untrained in the erudite and quite often machination of law. It is complex, too technical and issue-oriented, and too delicate and/or involved for the Petitioner to go

this route alone. This Petitioner has sought for help in this and other areas while trying to get his day in court. He has been systematically denied, and has cried out aloud for help; but has been left to wallow in his own tears.

Now this Petitioner, James E. Hawthorne, Pro-Se, comes to this High Bench to have this Illustrious Body to peer down at him and hopefully to register the desired compassion and understanding for his earnest and truly sincere plea. To this end the Petitioner makes this call to the high bench to grant this Petition for Writ of Certiorari.

CONCLUSION

For the reasons discussed and the facts of law, the Petitioner strongly feels that he has been dealt a great injustice on the part of the judicial system in both the United States District Court, and in the United States Court of Appeals for the Eleventh Circuit.

Petitioner respectfully prays that a Writ of Certiorari be issued to review the judgment below.

That no opinion was written on the case that went before the Eleventh Court of Appeals.

Petitioner feels that both Courts went against case law that has been set and ruled on by this High Bench.

That questions presented in the Petitioner's Writ of Certiorari have great impact on the Constitutional Laws and the Rules of Civil Procedure that govern the Federal Court Systems.

WHEREFORE, the Petitioner prays that this Honorable High Court will grant the Writ of

Certiorari, that Petitioner will be assured that he will have his day in Court and restores his faith in our Justice System.

James Hawthorne
Pro-Se Counsel
P.O. Box Box 9556
Pensacola, FL 32513

CERTIFICATE OF SERVICE

I Hereby Certify that a true and correct copy of the forgoing instrument and documents were sent via U.S. Mail to Barbara Auger, Esq., Florida Bar No. 0946400, P.O. Box 10095, Tallahassee, FL 32302-2095, (904) 222-3533, this 13 day of August, 1998

James Hawthorne
Pro-Se Counsel

Appendix A - Summary Judgment is Granted

JUDGMENT IN A CIVIL CASE

United States District Court *Northern District of Florida*

Case Title:	*Docket Number*
JAMES HAWTHORNE	*95-3027/RV*
v.	*Name of Judge or Magistrate Judge* *HONORABLE ROGER VINSON*

THE BOARD OF REGENTS OF THE STATE UNIVERSITY SYSTEM d/b/a THE UNIVERSITY OF WEST FLORIDA, JOHN MARTIN, individually, EARL SMITH, individually, DAN SIMPLE, individually, and RACHAEL BOOKER, individually.

☐ Jury Verdict. This action came before the Court and a jury with the judicial officer named above presiding. The issues have been tried and the jury has rendered its verdict.

X Decision by Court. This action came to trial or hearing before the Court with the judge (magistrate judge) name above presiding. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

that the motion for summary judgment is GRANTED for all defendants and against the plaintiff, JAMES HAWTHORNE, together with taxable costs.

ROBERT A. MOSSING, CLERK October 22, 1996
by Deputy Clerk: C. Justice
ENTERED ON DOCKET October 22, 1996 by cbj
Copies mailed to: Stewart, Culpepper, Auger, COB 1996

Appendix B - Notice of Appeal

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

JAMES HAWTHORNE,
Plaintiff

CASE NO. 9530274/RV

v.

UNIVERSITY OF WEST FLORIDA, Et.al.
Defendants

Notice of Appeal

Notice is hereby given that the Plaintiff to the action, James Hawthorne, hereby appeals to the United States Court of Appeals for the Eleventh Circuit, Atlanta, Georgia, from the Granting of Summary Judgment to the Defendants in this Action, University of West Florida, et.al. which was entered on the 22nd day of October, 1996.

_____

JAMES HAWTHORNE, PRO.SE.

(904)433-5520
412 East Strong Street
Pensacola, Florida 32501

Appendix C - Affirmed: Decision of Appeal Court

(DO NOT PUBLISH)

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 96-3664
Non-Argument Calendar

D.C. Docket No. 95-CV-30274,RV

JAMS HAWTHORNE

Plaintiff-Appellant

versus

THE UNIVERSITY OF WEST FLORIDA, JOHN MARTIN, EARL SMITH, DAN SIMPLE, and RACHAEL BOOKER,,

Defendants-Appellees

THE FLORIDA DEPARTMENT OF INSURANCE,Division of Risk Management

Defendant

Appeal from the United States District Court
for the Northern District of Florida

(October 31, 1997)

Before TJOFLAT, COX and CARNES, Circuit Judges.

PER CURIAM:

Appendix C

James E. Hawthorne appeals the district court's order granting the defendant's motion for summary judgment in Hawthorne's employment discrimination action. Having reviewed the briefs and the pertinent part of the record on appeal, we conclude that the district court properly entered summary judgment against Hawthorne.

AFFIRMED.

• All of appellant's outstanding motions are DENIED. Appellee's motion to strike appellant's brief is GRANTED as to Issues 2 and 3 of that brief. Appellee's motion to strike supplemental correspondence is DENIED as moot.

Appendix D - Petitions for Rehearing are Denied

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
No. 96-3664

JAMS HAWTHORNE

Plaintiff-Appellant

versus

THE UNIVERSITY OF WEST FLORIDA BOARD OF REGENTS, JOHN MARTIN, EARL SMITH, DAN SIMPLE, and RACHAEL BOOKER,

Defendants-Appellees

THE FLORIDA DEPARTMENT OF INSURANCE,Division of Risk Management

Defendant

On Appeal from the United States District Court
for the Northern District of Florida

ON PETITION(S) FOR REHEARING AND SUGGESTIONS(S) OF REHEARING EN BANC
(Opinion) _____
_____, 11th Cir., 19 ____,
_____F.2d____).
Before: TJOFLAT, COX and CARNES, Circuit Judges.
PER CURIAM
The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the suggestions(s) of rehearing En Bank are DENIED

ENTERED FOR THE COURT:

_____
UNITED STATES CIRCUIT JUDGE

Appendix E - 1st Extension of Time is Granted

In the Supreme Court
of the United States

James E. Hawthorne, Pro-Se

Petitioner

vs.

Application No.: A-736

University of West Florida, et.al.

Respondents

Request for an Extension of Time To File

Petition for Writ of Certiorari

COMES NOW, the Petitioner, James E. Hawthorne, Pro Se, requesting this Honorable and Illustrious High Court to grant this motion for a second extension of time to file his petition for Writ of Certiorari, and states the following in support of his request.

The Petitioner in this cause of action begs the indulgence and patience of this Honorable Court to allow this request under the liberal leave and license of Haines v. Kerner, 404 U.S. 519, 92 S. Ct., 594 (1992), and also Hughes v. Rose, 449 U.S. 101 S. CT., 173 (1980) 3 PLM 91 (April 1981):

> ...However, a pro-se complaint
> is held to less stringent
> standards than formal pleadings

Appendix E

drafted by lawyers, and should not be dismissed unless claims clearly do not state a legal violation or are not supported by factual allegations.

The Petitioner is requesting that he be granted a second thirty (30) day extension of time to file his petition for Writ of Certiorari because of **misrepresentation** by his attorney. On April 23, 1998, the Petitioner was scheduled for a final hearing with the Florida Bar concerning his case against his former attorney, Sadie Moore Stewart. The Petitioner received a phone call around April 17, 1998, from the Florida Bar notifying him that the hearing had been canceled because Ms. Stewart and the Florida Bar had agreed on a settlement in which Ms. Stewart has pleaded guilty (see attached). The Florida Bar also told the Petitioner that they had recommended to Judge Wright that Ms. Stewart receive a suspended sentence of 91 days and be fined. As of today, Ms. Stewart's license has been suspended **indefinitely**. Ms. Stewart has been found guilty of misrepresenting approximately six other clients.

This lawyer has caused great harm to the Petitioner's case and this is the Petitioner's main argument in his Writ of Certiorari to this High and Esteemable Court and for his request for an extension of time. He is requesting the extension of time to give him more time to seek legal help so he can file this Writ of Certiorari because his previous lawyer was found guilty of misrepresentation

and her license has been suspended indefinitely.

THEREFORE, based on the support herein, the petitioner prays that the Honorable Court will grant this request for a second extension of time of thirty (30) days. So that the ends of justice can be best served.

Certificate of Service

I hereby certify that on April _____, 1998, a true and correct copy of the foregoing brief has been furnished by United States certified mail to Barbara Auger Florida Bar No. 0946400, Pennington, Moore, Wilkinson & Dunbar, P.A., Post Office Box 10095, Tallahassee, Florida 32302-2095.

James E. Hawthorne
Pro-Se
P.O. Box 9556
Pensacola, Fla. 32513
(850) 433-5520

Appendix E

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

Mr. James E. Hawthorne
P.O. Box 9556
Pensacola, FL 32513

March 31, 1998

RE: James Hawthorne
v. University of West Florida, et.al.
Application No. A-736

Dear Mr. Hawthorne:

The application for an extension of time within which to file a peititon for a writ of certiorari in the above-entitled case has been presented to Justice Kennedy who on March 31, 1998, extended the time to and including April 30, 1998.

This letter has been sent to those designated on the attached notification list.

Sincerely,

WILLIAM K. SUTER,Clerk
By
Ruth Jones, Assistant

NOTIFICATION LIST:
Mr. James Hawthorne
P.O. Box 9556
Pensacola, FL 32513
Ms. Barbara Auger
P.O. Box 10095
Tallahassee, FL 32302-2095
Clerk, United States Court of appeals for the 11th Circuit
56 Forsyth Street, N.W.
Atlanta, GA 30303

Appendix F - 2nd Extension of Time is Granted

In the Supreme Court
of the United States

James E. Hawthorne, Pro-Se

Petitioner

vs.

Application No.: A-736

University of West Florida, et.al.

Respondents

Request for an Extension of Time
To File Petition for Writ of Certiorari

COMES NOW, the Petitioner, James E. Hawthorne, Pro Se, requesting this Honorable and Illustrious High Court to grant this motion for a **third and final extension of time** to file his petition for Writ of Certiorari, and states the following in support of his request.

The Petitioner in this cause of action begs the indulgence and patience of this Honorable Court to allow this request under the liberal leave and license of Haines v. Kerner, 404 U.S. 519, 92 S. Ct., 594 (1992), and also Hughes v. Rose, 449 U.S. 101 S. CT., 173 (1980) 3 PLM 91 (April 1981):

> ...However, a pro-se complaint is held to less stringent standards than formal pleadings drafted by lawyers, and should not be dismissed unless claims

clearly do not state a legal violation or are not supported by factual allegations.

The Petitioner is requesting that he be granted a **third and final forty five (45) day extension of time** to file his petition for Writ of Certiorari because of **misrepresentation** by his attorney. The Petitioner argued in the **District Court** that he had **misrepresentation**; again the Petitioner argued in the **Appeal Court** that he had **misrepresentation**; the Petitioner argued again in his **Initial Brief**, on pages 1, 2, and 3, that he had **misrepresentation**; the Petitioner also argued in his **reply brief** that he had **misrepresentation** on pages 7, 8, and 9; and the Petitioner argued that he had **misrepresentation** in his **EnBanc Consideration**. Under Rule 60. (b) Relief from Judgment or Order (see attached), the Petitioner's case should be sent back to the District Court for trial if the following things occur:

Misrepresentation: mistakes, inadvertence, excusable neglect, newly discovered evidence, fraud, etc.

Now the truth has come out, the Petitioner's former attorney, Sadie Moore Stewart has pleaded *guilty* on April 15, 1998 in the Supreme Court of Florida that she has misrepresented the Petitioner. See attached. (She also pleaded guilty to misrepresenting three other clients besides the Petitioner. At the time the Petitioner hired this attorney her license was under suspension by the Florida Bar.)

THEREFORE, based on the support herein, the

petitioner prays that the Honorable Court will grant this request for a **third and final** extension of time of forty five (45) days. So that the ends of justice can be best served.

Certificate of Service

I hereby certify that on May _____, 1998, a true and correct copy of the foregoing brief has been furnished by United States certified mail to Barbara Auger Florida Bar No. 0946400, Pennington, Moore, Wilkinson & Dunbar, P.A., Post Office Box 10095, Tallahassee, Florida 32302-2095 and to Judges Tjoflat, Cox, and Carnes, Circuit Judges at the U.S. Appeal Court, Eleventh Circuit, 56 Forsyth Street, N.W., Atlanta, Georgia 30303.

James E. Hawthorne
Pro-Se
P.O. Box 9556
Pensacola, Fla. 32513
(850) 433-5520

Appendix F

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

Mr. James E. Hawthorne
P.O. Box 9556
Pensacola, FL 32513

April 28, 1998

RE: James Hawthorne
v. University of West Florida, et.al.
Application No. A-736

Dear Mr. Hawthorne:

The application for an extension of time within which to file a peititon for a writ of certiorari in the above-entitled case has been presented to Justice Kennedy who on April 28, 1998, extended the time to and including May 29, 1998.

This letter has been sent to those designated on the attached notification list.

Sincerely,

WILLIAM K. SUTER,Clerk
By
Ruth Jones, Assistant

NOTIFICATION LIST:
Mr. James Hawthorne
P.O. Box 9556
Pensacola, FL 32513
Ms. Barbara Auger
P.O. Box 10095
Tallahassee, FL 32302-2095
Clerk, United States Court of appeals for the 11th Circuit
56 Forsyth Street, N.W.
Atlanta, GA 30303

Appendix G - *Attorney Suspended from Practice of Law, by the Supreme Court of Florida*

SUPREME COURT OF FLORIDA

WESNESDAY, DECEMBER 24, 1997

THE FLORIDA BAR,
Petitioner,
v.
SADIE MOORE STEWART, CASE NO. 91,803
Respondent

* *

The Florida Bar having filed its Notice of Noncompliance with a Subpoena on November 12, 1997, and respondent having failed to file a response,

IT IS ORDEREDED that respondent is suspended from the practice of law unti such time as all subpoenaed trust records are produced and omplete compliance has occurred. Respondent's suspension is effective thirty (30) days from the filing of this order so that resondent can close out her practice and protect the interests of existing clients.

KOGAN, C.J., OVERTON, SHAW, HARDING, WELLS AND ANSTEAD, JJ., and GRIMES, Senior Justice concur

KB

cc: Ms. Lois B. Lepp
Mr. John A. Boggs
Ms. Sadie Moore Stewart

Appendix H -Conditional Guilty Plea from Attorney to the Supreme Court of Florida on April 15, 1998 of Misrepresentation of the Petitioner

IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,
Complainant,

Case Nos. 91,263 and 91,338 and 91,940

vs.

TBS File Nos. 97-00765-01B
97-00617-01B
97-00727-01B

SADIE MOORE STEWART,
Respondent,

THE FLORIDA BAR,
Complainant,

Case No92,515

vs.

TBS File No. 97-00190-01B
97-00505-01B

SADIE MOORE STEWART,
Respondent,

THE FLORIDA BAR,
Complainant,

Case No.91,803

vs.

TBS File No. 98-00123-01B

SADIE MOORE STEWART,
Respondent,

THE FLORIDA BAR,
Complainant,

Case No.

vs.

TBS File Nos. 97-0001312-01B

SADIE MOORE STEWART,
Respondent,

Appendix H

THE FLORIDA BAR,
Complainant,

Case No.

vs.

TBS File Nos. 98-00713-01B

SADIE MOORE STEWART,
Respondent,

CONDITIONAL GUILTY PLEA FOR CONSENT JUDGMENT

Respondent, SADIE MOORE STEWART, files this conditional Guilty Plea of Consent Judgment to Rule 3-8.9, Rules of Discipline of the Florida Bar and says:

1. Respondent is, and at all times was, a member of The Florida Bar, subject to the jurisdiction and disciplinary rules of the Supreme Court of Florida.

2. Case Nos. 91,623, 91,338 and 91, 840 (The Florida Bar File Nos. 97-00765-01B, 97-00617-01B, and 97-00727-01B, respectively) have been consolidated before the Referee by order dated February 13, 1998. By agreement as outlined herein, Case No. 92,515 (The Florida Bar File Nos. 97-00190-01B and 97-00505-01B) is consolidted before the Referee with Case Nos. 91,623, 91,338 and 91, 840. With respect to The Florida Bar File Nos. 97-01312-01B and 98-9713-01B, as outlined herein, Respondent has waived probably cause and theifling of a formal complaint and has agreed to consolidation of these matters with Case Nos. 91,263, 91,338 and 91,840.

Case No. 91,803 (The Florida Bar File No. 98-00123-01B) is presently pending before the Supreme Court of florida and has not been assigned to the Referee for anyf urther proceedings. The parties will file a separate pleading with the Surpeme Court of Florida as a result of the agreement made herein.

Appendix H

Case No. 91,263 (TFB No. 97-00765-01B)
Complaint of The Florida Bar

3. Respondent admits that she has violated the following rules:

Rule 1-3.4(a) (any member who is suspended by reason of failure to complete continuing legal education requirements shall be deemed a delinquent member. A delinquent member shall not engage in the practice of law in this state and shall not be entitled to any privileges and benefits accorded to members of The Florida Bar in good standing. Any member suspended for failure to complete continuing legal education requirements may be reinstated as elsewhere provided in these rules) of the Rules of Professional Conduct, by the following acts:

Respondent was required to complete 30 hours, including two hours of Ethics, of Continuing Legal, Education prior to July 31, 1996. On or about August 16, 1996, The Florida Bar, via certified mail, advised Respondent that she was ineligible to practice law because of her failure to comply with her Continuing Legal Education Requirements (CLER). Due to Respondent's direction to her office staff, Respondent did not pick up the certified letter from The Florida Bar until September 19, 1996.

On or about September 26, 1996, Respondent filed a motion for extension of time in Michael Clark v. Robert E. Rubin, Secretary of the Treasury, the Department of Treasury and the U.S. Customs Service, Case No. 5:96CV3361RH, in the United States District Court, Northern District of Florida, Panama City Division, citing therein her health as the reason for the motion. At no time did Respondent advise the United States District Court that she was ineligible to practice law due to her failure to comply with CLER.

On or about October 1, 1996, Respondent petitioned

The Florida Bar for removal of CLER delinquency. In so petitioning, Respondent was required to fill out a form petition for removal of CLER delinquency. Respondent answered under oath all questions on the form petition except the following:

5. "During my delinquency, I have / I have not (circle one) practiced law in Florida or rendered advice on matters of Florida law."

Respondent was reinstated to membership in good standing, on or about October 3, 1996. Respondent continued her practice of law during the period that she was ineligible to practice law in Florida and despite her knowledge that she was ineligible to do so.

Case No. 91,338 TFB No. 97-00727-01B
(Complaint of James Hawthorne)

4. Respondent admits that she has violated the following Rules:

Rules 4-1.3 (A lawyer shall act with reasonable diligence and promptness in representing a client.), 4-1.4(b) (Duty to Explain Matters to Client. A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation), 4-3.2 (A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.), and 4-1.5(f) (Contingent Fees. As to contingent fees: (1) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (f)(3) or by law. A contingent fee agreement shall be in writing and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial, or appeal, litigation and other expenses to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated. Upon conclusion of a continent fee matter, the lawyer shall

provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination; (2) Every lawyer who accepts a retainer or enters into an agreement, express or implied, for compensation for services rendered or to be rendered in any action, claim, or proceeding whereby the lawyer's compensation is to be dependent or contingent in whole or in part upon the successful prosecution or settlement thereof shall do so only where such fee arrangement is reduced to a written contract, signed by the client, and by a lawyer for the lawyer or for the law firm representing the client. No lawyer or firm may participate in the fee without the consent of the client in writing. Each participating lawyer or law firm shall sign the contract with the client and shall agree to assume joint legal responsibility to the client for the performance of the services in question as if each were partners of the other lawyer or law firm involved. The client shall be furnished with a copy of the signed contract and any subsequent notices or consents. All provisions of this rule shall apply to such fee contracts; (4) A lawyer who enters into an arrangement for, charges, or collects any fee in an action or claim for personal injury or for property damages or for death or loss of services resulting from personal injuries based upon tortuous conduct of another, including products liability claims, whereby the compensation is to be dependent or contingent in whole or in part upon the successful prosecution or settlement thereof shall do so only under the following requirements: (A) The contract shall contain the following provisions: (i) "The undersigned client has, before signing this contract, received and read the statement of client's rights and understands each of the rights set forth therein. The undersigned client has signed the statement and received a signed copy to refer to while being represented by the undersigned attorney(s)." (ii) "This contract may be canceled by written notification to the attorney at any time within 'i business days of the date

the contract was signed, as shown below, and if canceled the client shall not be obligated to pay any fees to the attorney for the work performed during that time. If the attorney has advanced funds to others in representation of the client, the attorney is entitled to be reimbursed for such amounts as the attorney has reasonably advanced on behalf of the client; (C) Before a lawyer enters into a contingent fee contract for representation of a client in a matter set forth in this rule, the lawyer shall provide the client with a copy of the statement of client's rights and shall afford the client a full and complete opportunity to understand each of the rights as set forth therein. A copy of the statement, signed by both the client and the lawyer, shall be given to the client to retain and the lawyer shall keep a copy in the client's file. The statement shall be retained by the lawyer with the written fee contract and closing statement under the same conditions and requirements as subdivision (f)(5) of the Rules of Professional Conduct, by the following acts:

James E. Hawthorne filed suit in the United States District Court, Northern District of Florida, Pensacola Division, alleging racial discrimination and retaliatory conduct by the University of West Florida. After the University of West Florida filed a motion to dismiss, Mr. Hawthorne hired Respondent to represent him in this lawsuit.

On or about August 23, 1995, Respondent filed a notice of appearance in the case. Pursuant to an agreement of counsel and a pretrial order, certain disclosures as required by Rule 26 (A) of the Federal Rules of Civil Procedure (regarding witness lists, inte alia) were due to be filed on December 20, 1995. On or about December 22, 1995, the University of West Florida filed its Rule 26 (A) disclosure. On or about February 23, 1996, the University of West Florida filed a motion to compel the filing of the plaintiffs Rule 26 (A) disclosure. By order dated March 7, 1996, the court granted the University of West Florida's motion to compel and ordered that plaintiff s Rule 26 (A) disclosure

should be filed by March 14, 1996. The court also awarded attorneys fees in the amount of $68 to the University of West Florida which fees were to paid within IO days of the court's order.

Respondent filed the plaintiffs Rule 26 (A) disclosure on March 14, 1996. The University of West Florida filed a motion for summary judgment in April 1996, to which Respondent responded. By order dated October 22, 1996 the court granted summary judgment unto the University of West Florida. Respondent forwarded a copy of the order granting summary judgment to Mr. Hawthorne.Respondent did not clearly advise Mr. Hawthorne that he had 30 days from October 22, 1996 within which to file a notice of appeal of the order granting, summary judgment. On Wednesday, November 20, 1996, Mr. Hawthorne contacted Respondent to inquire as to whether she was going to file an appeal of the order granting summary judgment. Respondent appeared to be unaware that the time for filing the appeal ran on November 21, 1996. Apparently Mr. Hawthorne was under the impression that the time to appeal ran on November 22, 1996; nonetheless, on November 21, 1996, he filed a notice of appeal pro se. Respondent did not clearly establish with her client the issue of whether Mr. Hawthorne wanted to appeal the summary judgment and whether Respondent would file that notice of appeal for Mr. Hawthorne.

Respondent agreed to accept the representation of Mr. Hawthorne for a $500 retainer plus a fee contingent upon the outcome of the case. Respondent did not enter into a written contingency fee contract with Mr. Hawthorne nor did she provide Mr. Hawthorne with a copy of the statement 7 of 23 of clients rights.

Case No. 91,840, TFB No. 97-00617-OIB
(Complaint of Gillis Thomas)

5. Respondent admits that she has violated the following Rules:

Rules 4-1.6(a) (Confidentiality of information (a)

Consent Required to Reveal Information. A lawyer shall not reveal information relating to representation of a client except as stated in subdivisions (b), (c), and (d), unless the client consents after disclosure to the client) and 4-3.4(c) (a lawyer shall not knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists) of the Rules of Professional Conduct, by the following acts:

In approximately November 1996, Respondent was hired to represent Gillis Thomas in a employment discrimination matter a against J.C. Penney, Inc. A hearing-was scheduled before the
Honorable Lacy Collier, U.S. District Court, Northern District of Florida, Pensacola Division, for June 14, 1996 at 10:00 a.m. Respondent failed to appear at the hearing before Judge Collier. Respondent did attempt to make a telephone appearance before Judge Collier in this matter, but such appearance was denied. As a result of the June 14, 1996 hearing, certain costs were assessed against Mr. Thomas, the plaintiffs

After Mr. Thomas filed a complaint with The Florida Bar on January 17, 1997, Respondent wrote Mr. Thomas and advised that she was terminating the representation and cited therein certain attorney/client privilege, and therefore confidential, information relative to Mr. Thomas' case against J.C. Penney. Respondent provided J.C. Penney's counsel with a copy of her attorney/client privileged communication with Mr. Thomas which disclosed information detrimental to Mr. Thomas' action against J.C. Penney.

Case No. 92,515 (TFB Nos. 97-00190-01B and 97-00505-OIB)

(Complaints of Sammy Barnes, Ray,v Dunklin, and James Cox and Gary Scott)

6. Respondent admits that she has violated the following Rules:

Rules 4-1.4(h) (Duty to Explain Matters to Client. A

lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation); 4-1.15(a) (Clients' and Third Party Funds to be Held in Trust. A lawyer shall hold in trust, separate from the lawyer's own property, funds and property of clients or third persons that are in a lawyer's possession in connection with a representation. All funds, including advances for costs and expenses, shall be kept in a separate account maintained in the state where the lawyer's office is situated or elsewhere with the consent of the client or third person, provided that funds may be separately held and maintained other than in a bank account if the lawyer receives written permission from the client to do so and provided that such written permission is received prior to maintaining the funds other than in a separate bank account. In no event may the lawyer comingle the clients funds with those of the lawyer or those of the lawyers law firm. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property, including client funds not maintained in a separate bank account, shall be kept by the lawyer and shall be preserved for a period of 6 years after termination of the representation.); and 4-1.15(b) (Notice of Receipt of Trust Funds; Delivery; Accounting. Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a fall accounting regarding such property.) of the Rules of Professional Conduct and 5-1.1(a) (Nature of Money or Property Entrusted to Attorney. Money or other property entrusted to an attorney for a specific purpose, including advances for costs and expenses, is held in trust and must be applied only to that purpose. Money and

other property of clients coming into the hands of an attorney are not subject to counterclaim or setoff for attorney's fees, and a refusal to account for and deliver over such property upon demand shall be deemed a conversion. This is not to preclude the retention of money or other property upon which the lawyer has a valid lien for services or to preclude the payment of agreed fees from the proceeds of transactions or collection. Controversies as to the amount of fees are not grounds for disciplinary proceedings unless the amount demanded is clearly excessive, extortionate, or fraudulent. In a controversy alleging a clearly excessive, extortionate, or fraudulent fee, announced willingness of an attorney to submit a dispute as to the amount of a fee to a competent tribunal for determination may be considered in any determination as to intent or in mitigation of discipline; provided, such willingness shall not preclude admission of any other relevant admissible evidence relating to such controversy, including evidence as to the withholding of funds or property of the client, or to other injury to the client occasioned by such controversy.); 5-1.1(b) (Trust Accounts Required. Any bank or savings and loan association account maintained by a member of The Florida Bar to comply with rule 4-1.15, Rules of Professional Conduct, is and shall be clearly labeled and designated as a trust account. Any safe deposit box used in connection with the practice of law in Florida maintained by a member of The Florida Bar to comply with rule 4-1.15 shall be located in this state unless the client otherwise
consents in writing. A member of The Florida Bar shall advise any' institution in which such deposit box is located that it may include property of clients.); 5-1 .1 (c) (Trust Accounts as Official Records. A member of The Florida Bar shall preserve or cause to be preserved the records of all bank and savings and loan association accounts or other records pertaining to the funds(is or property of a client or a third party maintained in compliance with rule 4-1.15 for a period of not less than 6 years subsequent to

the. final conclusion of the representation of a client relative to such funds or property. Such records shall include checkbooks, canceled checks, check stubs, vouchers, ledgers and journals, closing statements, accountings or other statements of disbursements rendered to clients or third parties with regard to trust funds, or similar equivalent records clearly and expressly reflecting the date, amount, source, and reason for all receipts, withdrawals, deliveries, and disbursements of the funds or property of a client or third party. Such records shall be kept pursuant to these rules as a specific prerequisite to the right to receive, deliver, and disburse funds or property of a client or third party and to have a public aspect relating to the protection of clients and to fitness of a member of The Florida Bar to practice law. In any instance of an alleged violation by a member of The Florida Bar of this rule or of any of the Rules of Professional Conduct, such records insofar as they may relate in any way to the transaction, occurrence, or client in question shall be produced by the members of The Florida Bar for inspection, audit, and copying by a designated representative of The Florida Bar upon the direction of this court, a grievance committee, the board of governors if acting pursuant to rule 3-7.5(b), or a referee. Such records or copies thereof shall be admissible in evidence in any proceeding under this rule; provided notice of such intended use shall be given to any client involved, if practicable, unless such client is already aware of such intended use, and upon good cause shown by such client the admission of the same shall be under such conditions as shall be reasonably calculated thereafter to protect the confidences of such client in the event that the proceedings otherwise become public records. Permissible means of protection shall not prejudice the respondent and may include but are not limited to excision, in camera production, retention in seated envelopes, or similar devices. Failure to maintain such records or to produce them upon such direction shall constitute ground for

disciplinary action under this rule without regard to any other matter. The cost of any audit or investigation necessitated by such failure may be taxed against a respondent.); 5-1.1 (d) (Trust Accounting. Minimum trust accounting records shall be maintained and minimum trust accounting procedures must be followed by all attorneys practicing in Florida who receive or disburse trust money or property.); 5-1.1(e)(2) (Interest on Trust Accounts (IOTA) Program. Required Participation. All nominal or short-term funds belonging to clients or third persons that are placed in trust with any member of The Florida Bar practicing from an office or other business location within the state of Florida shall be deposited into one or more interest-bearing trust checking accounts in an eligible financial institution for the benefit of the Foundation, except as provided in rule 4-1.15 with respect to funds maintained other than in a bank account, or as provided in rule 5-1.2(a). Only trust funds that are nominal or short term shall be deposited 'into an IOTA account. The member shall certify annually, in writing, that the member is in compliance with, or is exempt from, the provisions of this rule.); 5-1.2(b) (Minimum Trust Accounting Records. The following are the minimum trust accounting records that shall be maintained: (1) A separate bank account or accounts and, if utilized, a separate savings and loan association account or accounts. Such accounts shall be located in the state of Florida unless the client otherwise directs, in writing, or unless the financial institution in which the funds are maintained voluntarily submits to the jurisdiction of the Supreme Court of Florida. Such voluntary submission to the j jurisdiction of the Supreme Court of Florida shall be on the form prescribed by the board of -governors of The Florida Bar. The account or accounts shall be in the name of the lawyer or law firm and clearly labeled and designated as a "trust account." (2) Original or duplicate deposit slips and, in the case of currency or coin, an additional cash receipts book, clearly identifying,: (A) the date and source of all trust funds

received; and (B) the client or matter for which the funds were received. (3) Original canceled checks, all of which must be numbered consecutively, or, if the financial institution wherein the trust account is maintained does not return the original checks, copies thereof, as provided by the financial institution. (4) Other documentary support for all disbursements and transfers from the trust account. (5) A separate cash receipts and disbursements 'journal, including columns for receipts, disbursements, transfers, and the account balance and containing at least: (A) the identification of the client or matter for which the funds were received, disbursed, or transferred; (B) the date on which all trust funds were received, disbursed, or transferred; (C) the check number for all disbursements; and (D) the reason for which all trust funds were received, disbursed,. or transferred. (6) A separate file or ledger with an individual card or page for each client or matter, showing all individual receipts, disbursements, or transfers and any unexpended balance, and containing: (A) the identification of the client or matter for which trust funds were received, disbursed, or transferred; (B) the date on which all trust funds were received, disbursed, or transferred; (C) the check number for all disbursements; and (D) the reason for which all trust funds were received, disbursed, or transferred. (7) All bank or savings and loan association statements for all trust accounts.); and 5-1.2(c) (Minimum Trust Accounting-Procedures. The minimum trust accounting procedures that shall be followed by all attorneys
practicing in Florida who receive or disburse trust money or property are as follows: (1) The lawyer shall cause to be made monthly: (A) reconciliations of all trust bank or savings and loan association accounts, disclosing the balance per bank, deposits in transit, outstanding checks identified by date and check number, and any other items necessary to reconcile the balance per bank with the balance per the checkbook and the cash receipts and disbursements journal; and (B) a comparison between the

total of the reconciled balances of all trust accounts and the total of the trust ledger cards or pages, together with specific descriptions of any differences between the 2 totals and reasons therefore. (2) At least annually, the lawyer shall prepare a detailed listing identifying the balance of the unexpended trust money held for each client or matter. (3) The above reconciliations, comparisons, and listing shall be retained for at least 6 years. (4) The lawyer or law firm shall authorize and request any bank or savings and loan association where the lawyer is a signatory on a trust account to notify Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300, in the event any trust check is returned due to insufficient funds or uncollected funds, absent bank error. (5) The lawyer shall file with The Florida Bar between June 1 and August 15 of each year a trust accounting certificate showing compliance with these rules on a form approved by the board of governors.) of the Rules Regulating Trust Accounts of The Florida Bar, by the following acts:

Respondent was hired, as successor counsel, by nine people to represent them in a racial discrimination case arising out of their employment by the U.S. Navy, Coastal Systems Station, Panama City, Florida. The representation was intended to become a class action matter.

On or about November 27, 1995, Respondent entered into a modified contingency fee agreement, signed by three of the plaintiffs, Sammy Barnes, Ray Dunklin, and James Cox, in which
the Respondent was paid a$12,500 retainer. Costs of the litigation were to be paid by the clients.

At the time the clients hired Respondent, they inquired about Respondent's experience in handling United States Code Title VII discrimination cases and class action matters. Respondent advised her clients that she was experienced and could handle their legal matter. At no time did the Respondent advise the clients that her experience in United States Code Title VII actions had been limited to administrative actions before the Equal

Employment Opportunity Commission (EEOC). At no time prior to being hired did Respondent advise her clients that she had never before participated in a class action matter.

Beginning in the spring of 1996 and for approximately three months, Respondent was out of her office a significant amount of time because of a family member's illness. Respondent left her paralegal, Tamara Tikell, in charge of her law practice. Ms. Tikell, as Respondent's agent, requested $1,000 from the clients in April 1996 to be used to pay costs of the litigation. The clients delivered a $1,000 check to Respondent's office in April 1996. The clients repeatedly requested a receipt for the $1,000 from Respondent's office, to no avail. The clients requested an accounting, for the $1,000 which Respondent did not provide.

In response to the instant inquiry / complaint (TFB File No. 97-00505-OIB) on January 3, 1997, Respondent advised The Florida Bar that "the money in question was used to pay for transcripts of the Plaintiffs depositions and miscellaneous expenses." Respondent's response references a court reporter bill for $945.25. Because of the allegations regarding the $1,000 cost deposit, the First Judicial Circuit Grievance Committee "B" requested an audit of Respondent's trust account for the time period January 1, 1995 through May 31, 1997. The audit reveals, and Respondent confirms, that the $1,000 check for costs was not deposited into Respondent's trust account. The $1,000 was not applied towards the clients' costs of litigation. The $1,000 was deposited into Respondent's operating account. According to Respondent, Tamara Tikell removed the S 1,000 from Respondent's operating account immediately after it was deposited therein.

Respondent became aware of the discrepancy over the $1,000 costs in approximately May, 1996. Respondent states that sometime after October 1, 1996, using her own funds, she paid a court reporter $945.25, to cover the costs of depositions related to this matter. Respondent has not

accounted to the clients for the balance of $54.75.

The trust account audit, unable to be completed due to lack of records, revealed the following deficiencies:

A. Respondent did not maintain the following records:

-Original or duplicate deposit records, indicating (a) date and source of the deposit and (b) client and/or matter, for
the months of July 1995 through August 1996;

-Original canceled checks for July 1995 through August 1996;

-Original bank statements for July 1995 through August 1996;

-Cash receipts and disbursements journal;

-Client ledger accounts;

-Bank reconciliations;

-Monthly comparisons;

-Annual listing of trust obligations;

B. Respondent's trust account is not set up as an IOTA (Interest on Trust Accounts) account;

C. The checks do not reflect Ms.. Stewart's name, nor do the checks reflect that the account is a trust account.

D. A shortage of funds existed in the trust account.

TFB No. 97-01312-01B
(Complaint of Shirley Minter-Smith)

7. Respondent has waived a formal finding of probable cause and the filing of a formal complaint with respect to TFB File No. 97-01312-0 1 B. Respondent consents to the consolidation of The Florida Bar File No. 97-01312-OIB with Supreme Court Case Nos. 91,263, 91,338 and 91,840 (TFB File Nos. 97-00765-OIB, 97-00617-OIB, and 97-00727-OIB, respectively, all of which have been consolidated before this Referee. Respondent hereby consents to the Referee having jurisdiction to consider and make recommendations to the Supreme Court of Florida as to this cause.

Appendix H

Respondent admits that she has violated Rule 4-1.4(a) (A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information) of the Rules of Professional Conduct, by the following actions:

On August 22, 1996, Respondent was retained by Ms. Shirley Minter-Smith to serve as attorney ad litem for her minor son's emancipation proceeding.

On or about September II, 1996, Ms. Minter-Smith's son was arrested for aggravated battery and robbery and Respondent was retained to handle his criminal case. Over the next 4-6 weeks, Ms. Minter-Smith was unable to communicate with Respondent to obtain information about the status of her son's criminal case.

On or about October 31, 1996, Ms. Minter-Smith retained another attorney to handle her son's criminal matter.

Respondent did not proceed with the emancipation proceeding while the criminal charges were pending. It appears that Ms. Minnter-Smith wanted to go forward with the emancipation proceeding, notwithstanding the criminal proceedings, yet the communication between Respondent and Ms. Minter-Smith on this issue is not clear.

TFB File No. 98-00713-01B
(Complaint of The Florida Bar)

8. Respondent has waived a formal finding of probable cause and the filing of a formal complaint with respect to TFB File No. 98-00713-01B. Respondent consents to the consolidation of The Florida Bar File No. 98-00713-01B with Supreme Court Case Nos. 91,26'), 91,338 and 91,840 (TFB File Nos. 97-00765-01 B, 97-00617-0 1 B, and 97-00727-0.1 B, respectively, all of which have been consolidated before this Referee. Respondent hereby consents to the Referee having jurisdiction to consider and make recommendations to the

Supreme Court of Florida as to this cause.

Respondent admits that she has violated Rules 4-3.4(c) (A lawyer shall not knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists) and 4-8.4(a.) (A lawyer shall not fail to respond, in writing, to any inquiry by a disciplinary agency when such agency is conducting, an investigation into the lawyer's conduct) of the Rules of Professional Conduct, by the following- acts:

Respondent represented the plaintiff Wanda Rogers in a federal action. The defendant, Marvin Runyon, the U.S. Postmaster, filed a motion for summary judgment At the hearing on the motion for summary judgment, Respondent appeared by telephone without leave of court while the defendants counsel was required to travel a significant distance to attend the hearing. Respondent conceded that summary judgment was appropriate. The defendant moved for a judgment of costs against Respondent based upon the above and Respondent did not respond, despite a requirement to do so under the court's rules. By order dated December 2, 1997, the United States District Court ordered Respondent to pay $2,260 to the defendant for her actions herein.

Respondent did not respond to The Florida Bar's requests for information about this matter.

Supreme Court Case No. 91,803
(TFB File No. 98-00123-01B)

9. In relation to the investigation of The Florida Bar File No. 97-00190-01 B, The First Judicial Circuit Grievance Committee "B" requested an audit of Respondent's trust account. Respondent was served with a subpoena for her trust account records, but Respondent did not comply with the trust account subpoena served on her on May 18, 1997, in that The Florida Bar only received partial records from Respondent. Respondent's non-compliance with the subpoena and non-response to the Supreme Court of Florida's order to show cause resulted in Respondent's

suspension from the practice of law effective January 26, 1998. Pursuant to the Court's order of December 24, 1997, Respondent is to remain suspended pending compliance with the subpoena and until further order of the Court. Respondent contends she has complied with the subpoena to the best of her ability. One of the matters included in this consent judgment in Case No. 92,515 (The Florida Bar File Nos. 97-00190-OIB and 97-00505-OIB) is Respondent's failure to maintain proper trust records. In light of the discipline to be imposed in this matter, including Case No. 92,515, The Florida Bar and Respondent agree to ask the Supreme Court of Florida to terminate the suspension in Case No. 91,803. The Florida Bar and Respondent will submit a separate pleading to the Supreme Court of Florida, alone, with a copy of this consent judgment, asking the Court to terminate the suspension in Case No. 91,803.

10. As an appropriate discipline for Respondent's misconduct, Respondent agrees to the imposition of a ninety-one (91) day suspension, which requires proof of rehabilitation, and to pay the costs of The Florida Bar.

11. The parties considered the following mitigating circumstances from the Florida Standards for Imposing Lawyer Sanctions, in reaching this agreement:

a. 9.32(b) Absence of dishonest or selfish motive;

b. 9.32(c) Personal or emotional problems: During 1996, Respondent was coping with the terminal illness and subsequent death of one of her sisters, for whom she was a caregiver. Further, Respondent was coping with the commission of a violent crime against her other sister. These events took Respondent out of her law office for a period of time and diverted her attention away from her law practice;

c. 9.32(f) Inexperience in the practice of law. Respondent was admitted to the practice of law on January 29, 1993 and most of the events occurred between late 1995 and 1997;

d. 9.32(e) Full and free disclosure to disciplinary

board or cooperative attitude towards proceedings. Respondent has cooperated with The Florida Bar in these proceedings and has been candid with The Florida Bar regarding her role and responsibility for these matters. Such cooperation and candor is a major consideration by The Florida Bar in entering into this consent judgment. Respondent contends that where she was non responsive, she had nothing to add to the proceedings;

e. 9.32(h) Physical or mental disability: Respondent suffers from Lupus which was diagnosed in 1997. During the time periods involved in these matters, Respondent was suffering from the symptoms of Lupus, which were undiagnosed. Respondent is currently being treated for Lupus.

f. 9.32(l) Remorse: Respondent's intent was to help these clients and she is remorseful that her actions or inactions resulted in harm to the clients and the public. Respondent recognizes that her major weakness stems from lack of office management skills and that she needs to associate herself with others who are better equipped at office management matters.

12. The parties considered the following aggravating circumstances from the Florida Standards for Imposing Lawyer Sanctions, in reaching this agreement:

a. 9.22(a) Prior disciplinary offenses: The Florida Bar File No. 96-00126-OIB (Complaint of Eugene M. Bernstein) - Respondent's neglect and lack of communication in an EEOC matter resulted in an admonishment before the grievance committee in 1996.

Supreme Court Case No. 90,013; The Florida Bar File No. 96-00958-OIB (Complaint of Jonathan McNabb) - Respondent's neglect and incompetent representation in a criminal matter resulted in a public reprimand in 1997.

Respondent is currently on an indefinite suspension for failure to comply with a trust account subpoena, as outlined in this consent judgment. Supreme Court Case No. 91,803; The Florida Bar File No. 98-00123-OIB.

b. 9.22(c) Pattern of misconduct; and

c. 9.22(d) Multiple offenses.

13. Respondent acknowledges that this Conditional Guilty Plea for Consent Judgment is tendered freely, voluntarily and without fear or threat of coercion.

14. Respondent acknowledges that she has been afforded all procedural and substantive due process guarantees regarding these disciplinary proceedings, and that for the purpose of tendering this Conditional Guilty Plea for Consent Judgment, Respondent hereby waives any objections relative to the denial of the same.

15. Respondent agrees to pay the costs incurred by The Florida Bar in bringing this action within 30 days of the Supreme Court of Florida's order which adopts any report of referee and this consent judgment, unless a waiver is granted by the Board of Governors.

16. If this plea is not approved by the Supreme Court of Florida, it is of no effect and neither the plea nor the statements contained herein can be used against Respondent in any way.

17. Should the Supreme Court of Florida approve this Conditional Guilty Plea for Consent Judgment, Respondent hereby agrees and acknowledges that same will not be the subject of future modification.

15 April, 1998

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Appendix I - Rule 60

Rule 60. Relief From Judgment or Order

(a) Clerical mistakes. Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such misstakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

(b) Mistakes; Inadvertence; Excusable Neglect, Newly Disco-vered Evidence; Fraud, Etc. On motions and upon such terms as are just, the court m relieve a party or a party's,"s legal representative from final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusesable neglect; (2) newly discovered evidence which which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon on which it is based has been reversed or discharged or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shalll be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not affect the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C. § 1655, or to set aside a judgment for fraud upon the court.

Ineffective Assistance of Counsel.

What is it?

Overview: The Sixth Amendment to the United States Constitution guarantees the right to effective assistance of counsel in all criminal prosecutions. The Supreme Court in Strickland v-Washington. 466 U.S. MS, 104 S.CL 2052 (1984), established a two prong test to evaluate Ineffective assistance claim: (1) that counsels performance fall below an objective standard of reasonableness, and (2) that counsel's deficient performance prejudiced the defendant resulting in an unreliable or fundamentally unfair outcome of the proceeding. The court has held that the second prong in Strickland requires more than a showing that the outcome of the proceeding would have been different but for counsel's error.

When deciding that a single error rendered counsel's performance ineffective,the Court must consider the totality of the circumstances when making its decision. Additionally, a court that finds that a defendant has failed to satisfy one prong of the Strickland test need not consider the other.

When considering the performance prong of Strinkland there is a "strong presumption" that counsel's strategy and tactics fall within the wide range of reasonable professional assistance. Courts have declined to characterize counsel's performance as ineffective assistance "when such counsel acted according to the defendant's restrictions on strategy, when the defendant failed to provide counsel with complete and accurate information, or when counsel refused to "assist the client in presenting false evidence or otherwise violating the law."

In evaluating the prejudice prong, the Supreme Court has identified a narrow category of cases in which prejudice is presumed. The presumption applies when there has been an "actual or constructive denial of the assistance of counsel altogether." or when there are various kinds of state interference with counsel's assistance" or when

counsel is burdened by an actual conflict of interest." The rationale for this per se rule is that, in these situations, prejudice is so likely to occur that a case-by-case inquiry is unnecessary.

II. Guilty Pleas, In the context of a guilty plea, a defendant can satisfy the prejudice prong by demonstrating that "but for counsel's deficient performance, a reasonable probability exists that the defendant would not have pleaded guilty and would have insisted on a trial."

III. Miscellaneous I.A.C. issues: Defend- Defendants have raised ineffectiveness claims concerning professional qualifications, performance before trial, actions regarding jury selection, performance during trial, actions concerning jury instructions, assistance during sentencing. and. performance on appeal.

Claims of Ineffective assistance of counsel are generally limited to collateral review and ordinarily will not be considered on direct appeal. Furthermore, defendants in state cases must exhaust state judicial remedies before a federal (U.S. District) Court will consider an ineffective assistance claim on habeas corpus review (28 USC 2254).

IV. Conflict of Interest Ineffective assistance of counsel may result from an attorney's conflict of interest In Cuvier v. Sullivan 446 U.S. 335. 100 S.Ct. 1708, 64 LEd.2d 333 (1980). the Supreme Court ruled that a defendant can demonstrate a Sixth Amendment violation by showing: (1) that defense counsel was actively representing conflicting interests, and (2) that such conflict had an adverse effect on specific instances of counsel's performance.

When a defendant alleges that a guilty pleas resulted from defense counsel's conflict interest, the defendant must show a reasonable probability that he/she would have insisted on a trial but for the effect of the conflict of interest on counsel's advice.

A trial court has a limited duty to potential conflicts of interest. The court must initiate an inquiry if it knows or reasonably should know. that a potential conflict exists.

When the trial court has notice of a potential conflict but fails to make such an inquiry, the reviewing court will presume a violation of the Sixth Amendment right to counsel.

Conversely, when the trial court has no notice of a potential conflict of interest and the claim is raised for the first time on appeal, or in a habeas corpus proceeding, the defendant must satisfy the two prong Cuvier test.

In federal court, when defendants are represented by the same counsel, Rule 44(c). Federal Rules of Criminal Procedure, expressly requires such courts to conduct a prompt inquiry into potential conflicts of interest and advise each defendant of the right to separate representation.

This rule requires the court to take action to protect each defendant's right to effective assistance of counsel unless, after inquiry, the court has "good cause to believe no conflict of interest is likely to arise."

The right to conflict-free assistance of counsel may be waived by the defendant, if the waiver is knowing and intelligent.

The trial court must recognize a presumption in favor of the defendant's to waiver the right of conflict free representation and and retain counsel, but "that presumption may be overcome not only by a demonstration of actual conflict but by a showing of a serious potential for conflict.

V. Intrusion into Client-Attorney Relationship. Once the defendant's right to counsel attaches, any government intrusion into the client-attorney relationship violates the Sixth Amendment if the defendant can show there is a realistic possibility that he/she was prejudiced by such intrusion.

In Weatherford v. Bursey, 429 U.S. 545. 97 & Ct 837. 51 LEd.2d 30 (1977). the Supreme Court outlined four factors to
the determination of whether the defendant suffered injury from any intrusion: (1) whether the government purposely

intruded into the client-attorney relationship, (2) whether any evidence offered
at trial was obtained directly or indirectly from the intrusion (3) whether the prosecutor obtained any details of the defendant's trial preparation or defense strategy, and (4) whether the overheard conversations had been used in in any other way to the substantial detriment of the defendant.

VI. In Evitts v. Lucey.469 U.& 387. 105 S.Ct. 830, 83 LEd.2d 821 (1985, the Supreme Court held that the Strickland standard also applies to appellate counsel. This standard applies to appeals as of a right only and not discretionary appeals since no right to counsel exists in a discretionary (collateral) appeal.

The Seventh Circuit U.S. Court of Appeals in Gray V. Green, 778 -F.2d 350 (7th Cir. 1985) held: (1) If appellate counsel has failed to raise a significant and obvious issue, failure could be viewed as deficient performance(s), and (2)'If (the) issue not raised may have resulted in a reversal of conviction, or an order for new trial, the failure was prejudicial."

Appellate counsel need not argue every issue, even if urged by Appellant. However, the issues raised "must not fall below 'an objective standard of reasonableness."'

In many cases, a counsel may not find, or be able to raise, arguable issues on appeal. Hence, he/she may file an Anders brief, see Anders v. California, 3W U.S. 738. 87 S.CL 1396. 18 LEd.2d 493 (1967), outlined by the Supreme Court to counsel from violating a professional duty owed to his/her client and the appellate court by not raising argument.

The general procedure established in Anders is to assure indigent defendants receive the same benefits afforded to those who are able to retain counsel on appeal.

No. 98-284

FILED
SEP 14 1998
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

October Term, 1997

JAMES HAWTHORNE,

Petitioner,

vs.

UNIVERSITY OF WEST FLORIDA, FLORIDA BOARD OF REGENTS, General Counsel, JOHN MARTIN, EARL SMITH, DAN SIMPLE, RACHAEL BOOKER,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Although somewhat inartfully drawn, Petitioner's Petition for Certiorari does in fact raise two issues. Properly restated, those questions are as follows:

1. Whether the Court of Appeals for the Eleventh Circuit erred in striking those portions of Petitioner's brief raising as error the District Court's refusal to grant relief from judgment under Rule 60(b), Fed. R. Civ. P., when no notice of appeal was ever filed after the district court's denial of relief?

2. Whether a claim of ineffective assistance of counsel under the Sixth Amendment to the United States Constitution can ever form the basis for relief from a judgment under Rule 60(b), Fed. R. Civ. P., when the underlying case is neither criminal nor penal in nature?

TABLE OF CONTENTS

Page

Questions Presented i

Table of Contents ii

Table of Cited Authorities iii

Facts and Procedural History 1

Analysis 3

A. Petitioner failed to file a timely Notice of Appeal 4

B. Petitioner's Initial Brief does not meet the requirements of a notice of appeal 8

C. Petitioner's ineffective assistance of counsel claim 9

D. Petitioner's claim of bias or prejudice 10

Conclusion 13

TABLE OF CITED AUTHORITIES

Cases:	Page
Acosta v. Louisiana Dept. of Health & Human Resources, 478 U.S. 251, 106 S. Ct. 2876, 92 L. Ed. 2d 192 (1986)	5
Brody v. President & Fellows of Harvard Coll., 664 F.2d 10 (1981)	12
Browder v. Director, Dept. of Corrections of Illinois, 434 U.S. 257, 98 S. Ct. 556, 54 L. Ed. 2d 521 (1978)	5
Easley v. Univ. of Michigan Bd. of Regents, 906 F.2d 1143 (6th Cir. 1990)	12
Griggs v. Provident Consumer Discount Co., 459 U.S. 56, 103 S. Ct. 400, 74 L. Ed. 225 (1982)	5
Liljeburg v. Health Services Acquisition Corp., 486 U.S. 847, 108 S. Ct. 2194 (1988)	11, 12
Link v. Wabash R. Co., 370 U.S. 626, 82 S. Ct. 1386, 8 L. Ed. 2d 734 (1962)	10
Lunde v. Helms, 29 F.3d 367 (8th Cir. 1994)	11, 12
Pioneer Investment Svcs. Co. v. Brunswick Associates Ltd. Partnership, 507 U.S. 380, 113 S. Ct. 1489, 123 L. Ed. 2d 74 (1993)	10
Smith v. Barry, 502 U.S. 244, 112 S. Ct. 678, 116 L. Ed. 2d 678 (1992)	8, 9

Table of Cited Authorities

	Page
Stone v. Immigration and Naturalization Service, 514 U.S. 386, 115 S. Ct. 1537, 131 L. Ed. 2d 465 (1995)	7
United States v. Robinson, 361 U.S. 220, 80 S. Ct. 282, 4 L. Ed. 2d 259 (1960)	5
Statutes:	
28 U.S.C. § 455 (1997)	3, 11, 12, 14
28 U.S.C. § 455(b)(4) (1997)	11
28 U.S.C. § 455(d)(4) (1997)	12
United States Constitution:	
Sixth Amendment	i, 9, 11
Rules:	
Fed. R. App. P. 4	7, 8, 9
Fed. R. App. P. 4(a)	4
Fed. R. App. P. 4(a)(1)	8
Fed. R. App. P. 4(a)(2)	5
Fed. R. App. P. 4(a)(4)	6, 7, 8

Table of Cited Authorities

	Page
Fed. R. App. P. 4(a)(4)(F)	7
Fed. R. Civ. P. 60	6
Fed. R. Civ. P. 60(b)	*passim*
Other Authority:	
Pub. L. 101-649, 104 Stat. 5048	7

APPENDIX

Appendix A — Order Of The United States District Court For The Northern District Of Florida, Pensacola Division Filed October 22, 1996 ..... 1a

Appendix B — Opinion Of The United States Court Of Appeals For The Eleventh Circuit Filed October 31, 1997 ..... 14a

As is plainly evident from the foregoing, Petitioner's case rests entirely on his two claims for relief under Rule 60(b), Fed. R. Civ. P. Because Petitioner failed ever to timely file any document which could reasonably be construed to serve as a "Notice of Appeal" from the District Court's denial of his Motion for Relief under Rule 60(b), these issues were not properly preserved for appeal. For that reason, the Court of Appeals for the Eleventh Circuit correctly dismissed those portions of Petitioner's Brief seeking reversal of the District Court's denial of relief under the rule. Therefore, since resolution of the first issue is dispositive of the second, the Court need not reach the second issue. Nonetheless, in an abundance of caution, both issues will be addressed on the merits.

FACTS AND PROCEDURAL HISTORY

The facts of this case are relatively simple and well-stated by the District Court:

> [Petitioner] James Hawthorne, a black male, began working at the University of West Florida ("UWF") as a custodian in 1981. At least as early as 1987, UWF experienced problems with Hawthorne, his job performance, and his attitude. From April 8, 1987, through February 13, 1991, Hawthorne had in excess of fifty incidents for which he was orally reprimanded or counseled regarding inappropriate procedure or behavior. On February 27, 1991, Hawthorne received a written reprimand for his harassment of other employees who provide services to UWF. Thereafter, for the next year, Hawthorne continued to behave improperly, and he committed at least another twenty-five violations for which he was again counseled, issued four

> written reprimands, suspended on three occasions, and issued two "below standards" performance appraisals. On February 25, 1992, Hawthorne was discovered using a phone in a locked faculty office in violation of UWF standards of conduct and in direct contravention of his earlier counseling concerning the use of phones in unauthorized areas. After Hawthorne had been counseled for the February 25, 1992, violation, he was overheard by a number of witness [sic] to say "I'll use any phone I want when I get good and ready." UWF terminated Hawthorne from his employment on March 2, 1992.
>
> On August 30, 1995, Hawthorne filed an amended complaint in this court under Title VII, alleging that in September of 1991, he was denied a promotion to the position of coordinator in the Building Services Department on the basis of his race. Hawthorne's complaint also allege[d] that the [Respondent] terminated him from his job in retaliation for making inquiries to the personnel department about his denial of the promotion.

Hawthorne v. Board of Regents of the State University System, No. 95-30274/RV (N.D. Fla. 1997), at 2. A Copy of the District Court's order is attached hereto as Exhibit "A." After extensive discovery, the District Court, honorable Roger Vinson, entered final summary judgment in favor of UWF, finding that Hawthorne could not prove a prima facie case of discrimination or retaliation under Title VII. *See id.* Petitioner filed a timely notice of appeal in the District Court on Nov. 21, 1996. On or about Feb. 24, 1997, Petitioner filed a Motion for Relief from Judgment[1] alleging as grounds for relief, that his

1. Petitioner's Motion for Relief under Rule 60(b) was entitled, "Motion Under Fed. R. Civ. P. Rule 60 and Motion to Relinquish Jurisdiction."

attorney had provided inadequate representation, and that Judge Vinson should have recused himself because his prior contributions to UWF amounted to bias sufficient to invoke the provisions of 28 U.S.C. § 455 (1997).[2] On March 13, 1997, the District Court denied Petitioner's Rule 60(b) Motion. On June 2, 1997, Petitioner filed his Initial Brief in the Court of Appeals for the Eleventh Circuit. Petitioner never filed a second notice of appeal after the denial of his Motion for Relief under Rule 60(b). Nonetheless, Petitioner argued in his brief, Parts II and III, that the District Court erred in denying his Rule 60(b) motion. On Oct. 31, 1997, a panel of the Eleventh Circuit affirmed the summary judgment entered below, in a brief unpublished opinion. A copy of the Eleventh Circuit's opinion is attached hereto as Exhibit "B." In a footnote to the opinion, the Court granted UWF's motion to strike issues II and III of Petitioner's brief. From the Eleventh Circuit's affirmance, Petitioner seeks review in this Court.

ANALYSIS

As previously stated, Petitioner's entire case in this Court turns on his failure to file a Notice of Appeal from the District Court's denial of his Motion for Relief from Judgment under Rule 60(b). Because the filing of a Notice of Appeal is mandatory and jurisdictional, Petitioner failed properly to preserve the denial of his Rule 60(b) motion for appellate review. Since he failed properly to invoke the jurisdiction of the Eleventh Circuit with respect to his Rule 60(b) motion, that Court properly struck the portion of Petitioner's brief seeking reversal of the District Court's order. Having failed to preserve

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2. Although Petitioner did not specifically rely on 28 U.S.C. § 455, it may be reasonably inferred from the language in his motion that as a result of Judge Vinson's de-minimis contributions to UWF, "his impartiality might reasonably be questioned." *See* discussion, *infra*, Part II D.

the question in the court below, Petitioner has also failed to preserve the question for review by this Court. Therefore, the Petition for Writ of Certiorari must be DENIED.

A. Petitioner failed to file a timely Notice of Appeal

As previously noted, Petitioner's Notice of Appeal was filed within 30 days of entry of the District Court's order granting summary judgment in favor of UWF (Nov. 21, 1996). Over four months later, his Motion for Relief under Rule 60(b) was denied (March 13, 1997). *Thereafter, Petitioner never filed another notice of appeal.* In his Initial Brief,[3] however, he raised as error the District Court's denial of his Rule 60(b) motion. Under the Federal Rules of Appellate Procedure, in order to appeal the denial of his Rule 60(b) motion, Petitioner would have had to file a notice of appeal, or some other document which could reasonably construed as such no later than April 13, 1997. Because he failed to do so, the Eleventh Circuit had no jurisdiction to consider that portion of his appeal and thus properly struck the portion of his brief addressing that issue.

Rule 4(a), Fed. R. App. P. provides:

> (1) Except as provided in paragraph (a)(4) of this Rule, in a civil case in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 must be filed with the clerk of the district court within 30

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3. Although Petitioner entitled his first brief "answer brief of appellee" that document was his "initial" brief filed. Petitioner's first brief did not contain any argument regarding his Rule 60(b) motion. After filing his first brief, Petitioner subsequently filed an amended brief (entitled "initial brief") which addressed his Rule 60(b) claims therein. It was to this amended brief which Respondent moved to strike parts II and III.

> days after the date of entry of the judgment or order appealed from. . . .

This Court has long held that the filing of a timely Notice of Appeal is "mandatory and jurisdictional." *Browder v. Director, Dept. of Corrections of Illinois*, 434 U.S. 257, 264, 98 S. Ct. 556, 561, 54 L. Ed. 2d 521, 527 (1978), quoting *United States v. Robinson*, 361 U.S. 220, 229, 80 S. Ct. 282, 288, 4 L. Ed. 2d 259 (1960). Further, as noted by this Court,

> [t]he filing of a notice of appeal is an event of jurisdictional significance — it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal.

Griggs v. Provident Consumer Discount Co., 459 U.S. 56, 58, 103 S. Ct. 400, 402, 74 L. Ed. 225, 227 (1982). Thus, Petitioner's failure ever to file a notice of appeal with regard to his Rule 60(b) motion, unless excused by some other applicable rule, was fatal to his appeal of the District Court's denial thereof.

Of course Rule 4(a)(2), Fed. R. App. P. provides a means whereby a notice of appeal filed prior to final resolution of the underlying case can "relate forward" to the date on which the case is finally disposed of. The rule states, "A notice of appeal filed after the court announces a decision or order but before the entry of the judgment or order is treated as filed on the date of and after the entry." As this Court has recognized, this exception was intended to mitigate the harsh result of rendering a previously filed notice of appeal a legal nullity simply because a post-trial motion is later filed. *See Acosta v. Louisiana Dept. of Health & Human Resources*, 478 U.S. 251, 106 S. Ct. 2876, 92 L. Ed. 2d 192 (1986). Petitioner does not fit within this exception because his notice of appeal was not filed before entry of the order granting summary judgment.

If Petitioner's first notice of appeal was to be effective to appeal the denial of his Rule 60(b) motion, it would have to fit within one of the six exceptions to the 30-day time limit for filing a notice of appeal embodied in Rule 4(a)(4), Fed. R. App. P. The Rule states:

> If any party files a timely motion of a type specified immediately below, the time for appeal for all parties runs from the entry of the order disposing of the last such motion outstanding. This provision applies to a timely motion under the Federal Rules of Civil Procedure:
>
> (A) for judgment under Rule 50(b);
>
> (B) to amend or make additional findings of fact under rule 52(b), whether or not granting the motion would alter the judgment;
>
> (C) to alter or amend the judgment under Rule 59;
>
> (D) for attorney's fees under Rule 54 if a district court under Rule 58 extends the time for appeal;
>
> (E) for a new trial under Rule 59; or
>
> (F) for relief under Rule 60 *if the motion is filed no later than 10 days after the entry of the judgment* (emphasis added).

The only possible exception of which Petitioner could avail himself in this case is subdivision (F). Under the explicit language of the Rule, however, Petitioner is clearly excluded from its operation. His motion for relief under Rule 60 was filed on Feb. 24, 1997, just over three months after entry of

summary judgment against him. Thus, Petitioner cannot claim the benefits of Rule 4(a)(4) either.

This Court recently undertook to address the interplay between Rule 60(b), Fed. R. Civ. P. and Rule 4, Fed. R. App. P. In *Stone v. Immigration and Naturalization Service*, 514 U.S. 386, 115 S. Ct. 1537, 131 L. Ed. 2d 465 (1995), the Court, in comparing appellate practice under the Federal Rules to that under the Immigration Act of 1990, Pub. L. 101-649, 104 Stat. 5048, elaborated on recent amendments to Rule 4. Justice Kennedy, writing for the majority, stated:

> With the exception noted,[4] the filing of a Rule 60(b) motion does not toll the running of the time for taking an appeal, . . . and the pendency of the motion before the district court does not affect the continuity of a prior-taken appeal. . . . Either before or after filing his appeal, the litigant may also file a Rule 60(b) motion for relief with the district court. The denial of the motion is appealable *as a separate final order*, and if the original appeal is still pending it would seem that the court of appeals can consolidate the proceedings.

Stone, 514 U.S. at 396, 115 S. Ct. at 1547, 131 L. Ed. 2d at 475. The conclusion is clear from the foregoing: since a Rule 60(b) motion filed more than ten days after the entry of summary judgment does not toll the time for appeal, it results in a separate final order for purposes of appeal and, consequently, the filing of a second and separate notice of appeal in order to preserve an appeal based on the Rule 60(b) motion. Thus, Petitioner's initial notice of appeal was effective only to appeal the district court's order granting summary judgment, not the denial of his

4. The relevant exception is the 10-day time limit contained in Rule 4(a)(4)(F), Fed. R. App. P., discussed *supra*.

Rule 60(b) motion. Therefore, the Court of Appeals properly refused to consider issues II and III of Petitioner's brief.

B. Petitioner's Initial Brief does not meet the requirements of a notice of appeal

This Court has recognized a very narrow exception to the rule that a notice of appeal must be filed in order to confer jurisdiction on the Court of Appeals. In *Smith v. Barry*, 502 U.S. 244, 112 S. Ct. 678, 116 L. Ed. 2d 678 (1992), this Court held that a brief filed by a pro se litigant within the time required by Rule 4(a)(1) was sufficient to meet the technical requirements of a notice of appeal. In *Smith*, the pro se plaintiff who suffered an adverse final judgment filed a notice of appeal before a motion for J.N.O.V. was finally disposed of. Noting that the notice of appeal was invalid under Rule 4(a)(4), the Court undertook to consider whether the plaintiff's later filed brief, which was filed within the 30-day time limit in Rule 4(a)(1) could serve as the functional equivalent of the notice of appeal. In finding that it did, the Court stated:

> While a notice of appeal must specifically indicate the litigant's intent to seek appellate review, . . . the purpose of this requirement is to ensure that the filing provides sufficient notice to other parties and the courts. . . . If a document filed within the time specified by Rule 4 gives the notice required by Rule 3, it is effective as a notice of appeal.

Smith, 502 U.S. at 248, 112 S. Ct. at 682, 116 L. Ed. 2d at 682 (internal citations omitted).

Petitioner cannot avail himself of this narrow exception, because his brief, unlike the plaintiff's brief in *Smith*, was not filed within the time specified by Rule 4. Quite to the contrary,

his brief was filed on June 2, 1997, almost three months from the date of Judge Vinson's order denying Petitioner's Rule 60(b) motion. Since the Court made absolutely clear in *Smith* that filing the brief within the time limit specified in Rule 4 was a prerequisite to invocation of the rule, Petitioner cannot avail himself of that narrow exception. Therefore, since he neither filed a second notice of appeal, nor any document which could reasonably be construed as a notice of appeal, on May 13, 1997, the date on which the time to file an appeal based on the Rule 60(b) motion expired, his right to appeal on that basis was extinguished. His Petition for Writ of Certiorari based on that order therefore must be denied.

C. Petitioner's ineffective assistance of counsel claim

It is a hornbook principle of constitutional law that the Sixth Amendment right to effective assistance of counsel applies only in criminal prosecutions. The amendment states in pertinent part, "*In all criminal prosecutions*, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence." U.S. CONST., Adt. VI (emphasis added). Petitioner in this case seeks to elevate his allegation that his attorney "misrepresented him"[5] to the level of a constitutional violation, justifying a complete disregard of the Federal Rules of Appellate Procedure. Having failed *himself* properly to preserve this issue for appeal, Petitioner cannot now rely on that claim to justify consideration of an appeal over which the Court of Appeals never had jurisdiction.

The rule in civil cases is simple: the proper remedy for negligence by counsel is a suit for malpractice against that

5. Throughout his Petition for Writ of Certiorari, Petitioner uses the term "misrepresentation" to refer to what can only be interpreted as a claim of malfeasance or misfeasance on the part of his attorney who was subsequently reprimanded by the Florida Supreme Court.

attorney, not relief from a properly entered order granting summary judgment. This principle was reaffirmed by this Court as recently as 1993. In *Pioneer Investment Svcs. Co. v. Brunswick Associates Ltd. Partnership*, 507 U.S. 380, 113 S. Ct. 1489, 123 L. Ed. 2d 74 (1993), Justice White speaking for the majority stated:

> . . . [W]e have held that clients must be held accountable for the acts and omissions of their attorneys. . . . In so concluding, we found "no merit to the contention that dismissal of petitioner's claim because of his counsel's unexcused conduct imposes an unjust penalty on the client." . . . "Petitioner voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent."

Pioneer, 507 U.S. at 396, 113 S. Ct. at 1499, 123 L. Ed. 2d at 90, quoting *Link v. Wabash R. Co.*, 370 U.S. 626, 82 S. Ct. 1386, 8 L. Ed. 2d 734 (1962) (internal citations omitted). Whether or not Petitioner's attorney was in fact negligent in prosecuting his case is irrelevant here. Having freely chosen her to represent him, he is bound by her acts in his representation. His only legal remedy for any acts of negligence on the part of his attorney is against that attorney. To allow reopening of the summary judgment entered in favor of UWF over a year later, aside from seriously prejudicing UWF's rights, is simply not a legally recognized remedy for his attorney's alleged misconduct.

D. Petitioner's claim of bias or prejudice

In addition to his claim of ineffective assistance of counsel, Petitioner also claimed, as grounds for relief under Rule 60(b),

that Judge Vinson was biased within the meaning of 28 U.S.C. § 455 (1997).[6] Although Petitioner has not specifically raised this claim in his Petition for Writ of Certiorari, it is implicit therein, since judicial bias is one of the grounds for his claim to relief under Rule 60(b), as is his Sixth Amendment claim.

As a preliminary matter, it is important to note that Petitioner never filed a motion for recusal in the District Court. Only upon the Eleventh Circuit's affirmance of the District Court's order did Petitioner raise judicial bias as grounds for relief from the judgment under Rule 60(b). Assuming Petitioner had properly preserved the issue for appeal to the Eleventh Circuit, the fact that he seeks relief under Rule 60(b) for alleged bias would not necessarily be fatal to his claim. As this Court has recognized, section 455 can serve as a basis for relief from judgment in the proper circumstances. *See Liljeburg v. Health Services Acquisition Corp.*, 486 U.S. 847, 108 S. Ct. 2194 (1988). Those circumstances, however, are not present here.

Petitioner alleges bias on the part of Judge Vinson based on his past contributions to UWF. Without more, this is an insufficient basis for recusal under section 455, whether before or after judgment. Of the Circuit Courts which have considered the issue, none has found this connection alone sufficient to warrant section 455 relief. For example, in *Lunde v. Helms*, 29

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6. Section 455, as amended, requires a district judge to recuse himself "in any proceeding in which his impartiality might reasonably be questioned." In addition, the statute requires recusal in a number of specified circumstances, including where

> He knows that he, individually or as a fiduciary, . . . has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding.

28 U.S.C. § 455(b)(4) (1997).

F.3d 367 (8th Cir. 1994), the Eighth Circuit Court of Appeals held that a district judge's refusal to recuse himself on the ground that he had both graduated from the defendant University and made contributions thereto was well within the judge's discretion and not subject to reversal. *Lunde*, 29 F.3d at 370-71. After dispensing with the judge's alumnus status as a ground for recusal, the court considered the judge's contributions to the university, stating, "We do not think that making alumni contributions or participating in university educational programs, without more, is a reasonable basis for questioning the judge's impartiality." *Id.* at 371. *See also Easley v. Univ. of Michigan Bd. of Regents*, 906 F.2d 1143 (6th Cir. 1990) (holding district judge's graduation from defendant university and continuing ties therewith insufficient to constitute bias under section 455); *Brody v. President & Fellows of Harvard Coll.*, 664 F.2d 10 (1981) (same).

The relevant inquiry under section 455 is an objective one: whether an objective observer could reasonably believe that the judge's ties with the defendant create an appearance of partiality. *See Liljeburg, supra*. This court found section 455's standard met in *Liljeburg*, based on the fact that the district judge was a member of the board of trustees of the defendant, which stood to gain financially by a decision in its favor.[7] *Liljeburg, supra*, 486 U.S. 860-71, 108 S. Ct. at 2202-08. Any reasonable observer could easily conclude that where a judge who is a board member of a corporation litigating a nearly $6,700,000 real estate sale in his courtroom might not appear completely impartial. Thus the decision in *Liljeburg*. This case, however, comes nowhere near the facts of *Liljeburg*. Judge

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7. It is noteworthy that the situation in *Liljeburg* was also specifically governed by the language of section 455, which defines a financial interest as "ownership of a legal or equitable interest, however small, *or a relationship as a director, adviser, or other active participant* in the affairs of a party. . . ." 28 U.S.C. § 455(d)(4) (1997).

Collier would be utterly unaffected financially even in the event of a substantial judgment against UWF. Therefore, consonant with the Circuit Court decisions on identical facts, his contributions to UWF alone cannot constitute grounds for relief from judgment under Rule 60(b), even if Petitioner had properly preserved this issue for appeal, which he clearly did not.

CONCLUSION

This Court's precedents make clear that, in order to properly preserve a litigant's right to appeal, a timely-filed notice of appeal is both mandatory and jurisdictional. Also clear is the fact that a motion for relief under Rule 60(b), which is filed more than ten days after entry of the final judgment does not toll the time for appeal of the underlying judgment and requires a separate notice of appeal in order to preserve the right to claim error in the denial thereof. Having filed neither a timely notice of appeal, nor any document which could reasonably be construed to be a notice of appeal, Petitioner has failed to meet the requirements for appellate jurisdiction over this appeal. Furthermore, because both issues raised in his Petition for Writ of Certiorari depend on the timely filing of the notice of appeal, neither issue was properly before the Court of Appeals. Thus, *a fortiori*, this Court lacks jurisdiction to determine those issues.

Regardless of the fact that Petitioner failed to satisfy the jurisdictional prerequisites to appellate review, his claim of ineffective assistance of counsel in this civil case, is clearly without merit. Neither this Court nor any other federal court has ever held that ineffective assistance of counsel in a civil case rises to the level of a constitutional violation, justifying departure from well-settled precedent. Furthermore, Petitioner's alternate and implicit ground for relief under Rule 60(b), the district judge's alleged bias, is also wholly without merit.

Neither this Court nor any Court of Appeals considering the issue has ever found contributions to a party university to be a sufficient ground to require recusal under section 455. In sum, because Petitioner has failed to present any issue over which this Court could validly preside, his Petition for Writ of Certiorari must be denied.

Wherefore, Respondent respectfully requests that this Court DENY Petitioner's Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX A — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA, PENSACOLA DIVISION FILED OCTOBER 22, 1996

IN THE UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF FLORIDA PENSACOLA DIVISION

CASE NO. 95-30274/RV

JAMES HAWTHORNE,

Plaintiff,

v.

THE BOARD OF REGENTS OF THE STATE UNIVERSITY SYSTEM d/b/a THE UNIVERSITY OF WEST FLORIDA, JOHN MARTIN, individually, EARL SMITH, individually, DAN SIMPLE, individually, and RACHAEL BOOKER, individually,

Defendants.

ORDER

Pending is the motion of defendant The Board of Regents of the State University System d/b/a The University of West Florida for summary judgment. (Doc. 41).

I. BACKGROUND

This is an employment discrimination action, brought pursuant to Title VII of the Civil Rights Act of 1964 [42 U.S.C.

§§ 2000e, *et seq.*]. Except as noted, the following material facts are undisputed in the record.[1]

Plaintiff James Hawthorne, a black male, began working at the University of West Florida ("UWF") as a custodian in 1981. At least as early as 1987, UWF experienced problems with Hawthorne, his job performance, and his attitude. From April 8, 1987, through February 13, 1991, Hawthorne had in excess of fifty incidents for which he was orally reprimanded or counseled regarding inappropriate procedure or behavior. On February 27, 1991, Hawthorne received a written reprimand for his harassment of other employees who provide services to UWF. Thereafter, for the next year, Hawthorne continued to behave improperly, and he committed at least another twenty-five violations for which he was again counseled, issued four written reprimands, suspended on three occasions, and issued two "below standards" performance appraisals. On February 25, 1992, Hawthorne was discovered using a phone in a locked faculty office in violation of UWF standards of conduct and in direct contravention of his earlier counseling concerning the use of phones in unauthorized areas. After Hawthorne had been counseled for the February 25, 1992, violation, he was overheard by a number of witness to say "I'll use any phone I want when I get good and ready." UWF terminated Hawthorne from his employment on March 2, 1992.

On August 30, 1995, Hawthorne filed an amended complaint in this court under Title VII, alleging that in

1. All of the following facts are contained in the Defendant's statement of undisputed facts and are supported by the record. Because the Plaintiff has failed to controvert the Defendant's statement, these facts are admitted as true. *See* Local Rule 56.1 (A). Further, upon reviewing all of the record evidence in this case, it appears that these facts are undisputed, except as noted in the text.

September of 1991, he was denied a promotion to the position of coordinator in the Building Services Department on the basis of his race. Hawthorne's complaint also alleges that the defendants terminated him from his job in retaliation for making inquiries to the personnel department about his denial of the promotion. Defendant UWF now moves for summary judgment.

II. ANALYSIS

A. *Summary Judgment Standard*

A motion for summary judgment should be granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Rule 56(c), Fed. R. Civ. P. "[T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett,* 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265, 273 (1986). *See Everett v. Napper,* 833 F. 2d 1507, 1510 (11th Cir. 1987).

However, summary judgment is improper "[i]f a reasonable fact finder could draw more than one inference from the facts, and that inference creates a genuine issue of material fact." *Cornelius v. Highland Lake,* 880 F.2d 348, 351 (11th Cir. 1989), *cert. denied,* 494 U.S. 1066, 110 S. Ct. 1784, 108 L. Ed. 2d 785 (1990). An issue of fact is "material" if it might affect the outcome of the case under the governing law. *Anderson v.*

Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202, 211 (1986). It is "genuine" if the record taken as a whole could lead a rational trier of fact to find for the non-moving party. *Id. See also Matsushita Electric Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538, 552 (1986).

Conclusory allegations based on speculation, subjective beliefs, or bald assertions based upon unsubstantiated hearsay are insufficient to create a "genuine issue of material fact." *Carter v. Miami*, 870 F.2d 578, 585 (11th Cir. 1989); *Ramsey v. Leath*, 706 F.2d 1166, 1170 (11th Cir. 1983). On the other hand, if the record taken as a whole could lead a rational trier of fact to find for the nonmoving party, then the issue of fact is genuine. *Matsushita Elec. Industrial Co. Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538, 552 (1986). On a summary judgment motion, the record and all reasonable inferences that can be drawn from it must be viewed in the light most favorable to the non-moving party. *McCabe v. Sharett*, 12 F.3d 1558, 1560 (11th Cir. 1994).

B. *Title VII*

(1) **Race Discrimination.** Title VII of the Civil Rights Act of 1964 provides that it is unlawful for an employer "to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1) (1988). The plaintiff may establish a prima facie case of discrimination under Title VII on the basis of statistical proof of a pattern of discrimination [see *Verbraeken v. Westinghouse Elec. Com.*, 881 F.2d 1041 , 1045 (11th Cir. 1989), *cert. dismissed*, 493 U.S. 1064, 1 10

S.Ct. 884, 107 L.Ed.2d 1012 (1990)], or on the basis of direct evidence of discrimination, which consists of "evidence which, if believed, would prove the existence of discrimination without inference or presumption." *Carter v. City of Miami*, 870 F.2d 578, 581-82 (11th Cir. 1989). In the usual case, however, direct evidence is not present, and the plaintiff must rely on circumstantial evidence to prove discriminatory intent, using the framework established in *McDonnell Douglas Corp. v. Green*, 41 1 U.S. 792, 802-04, 93 S.Ct. 1817, 1824-25, 36 L.Ed.2d 668 (1973).

Under *McDonnell Douglas*, a plaintiff establishes a prima facie case of race discrimination under Title VII by showing: (1) he belongs to a racial minority; (2) he was subjected to adverse job action; (3) his employer treated similarly situated employees outside his classification more favorably; and (4) he was qualified to do the job. *McDonnell Douglas Corp., supra*, 411 U.S. at 802, 93 S.Ct. at 1824, 36 L.Ed.2d at 677; *Coutu v. Martin County Bd. of County Comm'rs*, 47 F.3d 1068, 1073 (11th Cir. 1995); *Turnes v. AmSouth Bank, N.A.*, 36 F.3d 1057, 1060 (11th Cir. 1994); *see also St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 506, 113 S.Ct. 2742, 2747, 125 L.Ed.2d 407 (1993). Demonstrating a prima facie case is not onerous; it requires only that the plaintiff establish facts adequate to permit an inference of discrimination. *See Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253-54, 101 S.Ct. 1089, 1094, 67 L.Ed.2d 207, __ 1981); *Williams v. Ford Motor Co.*, 14 F.3d 1305, 1308 (8th Cir. 1994).

In this case, the plaintiff is a black male who was not promoted to the position of coordinator. Instead, the position was awarded to James Holt, a white male. Therefore, Hawthorne has satisfied the first three elements of his prima facie case.

However, Hawthorne has failed to established the fourth and final element of his prima facie case because he has not presented any evidence that was qualified to perform the job of coordinator. It is uncontroverted in this case that during the relevant time period, the Building Services Department was in the midst of a reorganization, with attending moving of offices and equipment, and UWF needed someone with moving experience to fill the position of coordinator. Holt was the only employee at that time with moving experience, having worked a number of years as a manager for U-Haul. Hawthorne had no moving experience. Additionally, the record makes it abundantly clear that Hawthorne had a long and consistent history of poor job performance, which would have apparently excluded him from consideration in any event. Therefore, Hawthorne has failed to establish a prima facie case of race discrimination.

However, even assuming that Hawthorne has established a prima facie case, UWF is still entitled to summary judgment. Once the plaintiff has established a prima facie case, thereby raising an inference that he was the subject of intentional race discrimination, the burden shifts to the defendant to rebut this inference by presenting legitimate, non-discriminatory reasons for its employment action. *Burdine, supra,* 450 U.S. at 254, 101 S.Ct. at 1094, 67 L.Ed.2d at __. This intermediate burden is "exceedingly light." *Turnes, supra,* 36 F.3d at 1061.

As noted, UWF asserts that Hawthorne was not promoted because he did not have any moving experience, a necessary qualification for the job. Additionally, according to UWF, Hawthorne's poor job performance and negative attitude prevented him from becoming a viable candidate for any promotion during his employment at UWF. The defendant has

clearly met its burden of presenting legitimate, nondiscriminatory reasons for the selection of Holt, rather than Hawthorne, for the coordinator position. Where the defendant meets this burden, the plaintiff has the opportunity to demonstrate that the defendant's articulated reason for the adverse employment action is a mere pretext for discrimination. *McDonnell Douglas, supra,* 411 U.S. at 804, 93 S.Ct. at 1825, 36 L.Ed.2d at ; *Roberts v. Gadsden Memorial Hosp.,* 835 F.2d 793, 796 (11th Cir. 1988). This demonstration merges with the plaintiff's ultimate burden of showing that the defendant intentionally discriminated against the plaintiff. *St. Mary's Honor Ctr. v. Hicks, supra,* 509 U.S. at 511, 113 S.Ct. at 2749, 125 L.Ed.2d at 422; *Pignato v. American Trans Air, Inc.,* 14 F.3d 342, 346-47 (7th Cir.); *cert. denied,* __ U.S. __, 114 S.Ct. 2675, 129 L.Ed.2d 810 (1994). Put another way, once the employer succeeds in carrying its intermediate burden of production, the ultimate issue in the case becomes whether the plaintiff has proven that the employer intentionally discriminated against him because of his race. *Isenbergh v. Knight-Ridder Newspaper Sales, Inc.,* __ F.3d __ , 1996 WL 531799 at *4 (11th Cir. Sept. 19, 1996); *Turnes v. AmSouth Bank, N.A.,* 36 F.3d 1057, 1061 (11th Cir. 1994).

Hawthorne has failed to establish that the defendant's proffered reason is unworthy of credence, or that the defendant was more likely motivated by a discriminatory reason in failing to select Hawthorne for the promotion. *See Karazanos v. Navistar Int'l Transp. Corp.,* 948 F.2d 332, 336 (7th Cir. 1991). Hawthorne's main contention is that he was just as qualified as Holt, and that discrimination must have played a role in the defendant's decision not to hire him. However, even if the record evidence supported Hawthorne's assertion that he and Holt were equally qualified (which it does not), "the employer

has the discretion to choose among equally qualified candidates, provided the decision is not based upon unlawful criteria." *Burdine, supra,* 450 U.S. at 259, 101 S.Ct. at 1097, 67 L.Ed.2d at __. Moreover, Hawthorne's assertion that the defendants' failed to promote him on the basis of his race is completely unsubstantiated. The undisputed testimony of Bertha Jones, the Superintendent of the Building Services Department, is that Holt was awarded the promotion because he possessed significant moving experience that Hawthorne lacked. The record evidence also establishes beyond any doubt that Hawthorne had exhibited a lengthy and clear pattern of poor job performance prior to the time he was denied promotion. Hawthorne's conclusory allegations of discrimination, unsupported by affidavit or evidence, are totally insufficient to create an issue of fact. *Isenbergh, supra,* __ F.3d at __ 1996 WL 531799 at *8; *Meiri v. Dacon,* 759 F.2d 989, 998 (2d Cir.), *cert. denied,* 474 U.S. 829, 106 S.Ct. 91, 88 L.Ed.2d 74 (1985); *Forsberg v. Pacific Northwest Bell Tel. Co.,* 840 F.2d 1409, 419 (9th Cir. 1988). Since the defendant has proffered evidence supporting a legitimate, nondiscriminatory reason for not promoting Hawthorne, and Hawthorne has not come forward with any evidence to show that this reason is pretextual, summary judgment is warranted. *See Richmond v. Board of Regents of University of Minnesota,* 957 F.2d 595, 598 (8th Cir. 1992); *Karazanos, supra,* 948 F.2d at 336.

(2) Retaliation. The Plaintiff also alleges that he was fired in retaliation for his inquiries into Holt's promotion. UWF contends that Hawthorne has failed to establish a causal connection between his inquiries into Holt's promotion and his termination. UWF further contends that even if the plaintiff can establish a prima facie case of retaliation, UWF had legitimate, non-discriminatory reasons for terminating the plaintiff.

To establish a prima facie case of retaliation, the plaintiff must show: (1) that he engaged in statutorily protected expression; (2) that he suffered an adverse employment action; and (3) that there is some causal relationship between the two events. *Meeks v. Computer Associates Int'l*, 15 F.3d 1013, 1021 (11th Cir. 1994); *E.E.O.C. v. Ohio Edison* Co., 7 F.3d 541 (6th Cir. 1993); *Archuleta v. Colorado Dept. of Institutions*, 936 F.2d 483 (10th Cir. 1991). "To recover for retaliation, the plaintiff 'need not prove the underlying claim of discrimination which led to [his] protest,' so long as [he] had a reasonable good faith belief that the discrimination existed." *Meeks, supra,* 15 F.3d at 1021 *(quoting Tipton v. Canadian Imperial Bank of Commerce,* 872 F.2d 1491, 1494 (11th Cir. 1989)).

To meet the causal link requirement, the plaintiff "merely has to prove that the protected activity and the negative employment action are not completely unrelated." *E.E.O.C. v. Reichhold Chemical, Inc.*, 988 F.2d 1564, 1571-72 (11th Cir. 1993). The plaintiff must at least establish that the employer was actually aware of the protected expression at the time the employer took adverse employment action against the plaintiff. *Goldsmith v. City of. Atmore,* 996 F.2d 1155, 1163 (11th Cir. 1993); *Weaver v. Casa Gallardo, Inc.*, 922 F.2d 1515, 1524 (11th Cir. 1991). The employer's awareness of the statement may be established by circumstantial evidence. *Id.*

As in his race discrimination claim, once the plaintiff establishes his prima facie case, the employer must proffer a legitimate, non-discriminatory reason for the adverse employment action. *Reichhold Chemical, supra,* 988 F.2d at 1571-72. If the employer offers legitimate reasons for the employment action, the plaintiff must then demonstrate that the employer's proffered explanation is a pretext for retaliation.

Meeks, supra, 15 F.3d at 1021; *Goldsmith, supra,* 996 F.2d at 1163.

Here, the record shows that at the time Hawthorne was fired, UWF was aware of his inquiries into Holt's promotion. In fact, Hawthorne had made repeated inquiries to the UWF Human Resources office regarding the qualifications of Holt. I assume that such inquiries are "protected activity," although that may be questionable. Therefore, taken in a light most favorable to the plaintiff, it appears that UWF was aware of the protected activity, and that "the protected activity and the negative employment action are not completely unrelated." *Reichhold Chemical, supra,* 988 F.2d at 1571-72. Thus, I next examine the defendant's reasons for the negative action.

UWF maintains that it fired Hawthorne because he was caught in a locked faculty office using an unauthorized phone. This violated the Standards of Conduct of UWF for "Unauthorized Use of State Property" and for "Misuse of Position." Additionally, Hawthorne had been counseled twice before for violating UWF's policy forbidding the unauthorized use of phones. Finally, despite a third counseling session following Hawthorne's latest use of an unauthorized phone, Hawthorne was overheard to say "I'll use any phone I want when I get good and ready."

UWF's reasons for firing the plaintiff are more than sufficient to meet its intermediate burden. Any reasonable employer would be fully justified in terminating an employee under similar circumstances, or much earlier. Further, as with his discrimination claim, Hawthorne has failed to demonstrate that the employer's proffered explanation is a pretext for retaliation. *Meeks, supra,* 15 F.3d at 1021; *Goldsmith, supra,*

996 F.2d at 1163. The undisputed evidence is that the plaintiff was caught using an unauthorized phone in contravention of UWF policy and his previous counseling. This, in combination with his insubordination and repeated violations, resulted in his termination. Plaintiff has offered nothing to contest this conclusion, other than his own unsupported allegations of retaliation.[2] Consequently, in this case, the defendant's evidence of a legitimate, non-discriminatory reason for its action is so strong as to rebut completely any inference of retaliation. *See Grigsby v. Reynolds Metals Co.*, 821 F.2d 590, 596 (11th Cir. 1987). The record is simply not sufficient to create an issue of fact in light of the substantial evidence of lawful motive presented by the defendant. *See Holt v. KMI-Continental, Inc.*, __ F.3d __ 1996 WL 497199 at *6 (2d Cir. Sept. 4, 1996). As a result, the UWF is entitled to summary judgment on the Plaintiff's retaliation claim.

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2. Furthermore, even if Hawthorne had presented evidence that UWF retaliated against him for making inquiries into Holt's promotion, which he has not, summary judgment would still be appropriate because of the unreasonable manner in which Hawthorne made his inquires. It is uncontroverted that Hawthorne, without the permission of his supervisors, spent a significant amount of time during work hours at the Human Resources office making his requests, and that this interfered with Hawthorne's ability to fulfill his job responsibilities. While Title VII shields an employee from retaliation for his opposition to unlawful employment practices [*See* 42 U.S.C. § 2000e-3(a)), the protection is not absolute. "[T]o qualify for the protection of the statute, the manner in which an employee expresses [his] opposition to an allegedly discriminatory employment practice must be reasonable." *Rollins v. State of Florida Dep't of Law Enforcement*, 868 F.2d 397, 401 (11th Cir. 1989). In other words, Title VII's anti-retaliation provision "was not intended to immunize insubordinate, disruptive, or nonproductive behavior at work." *Armstrong v. Index Journal Co.*, 647 F.2d 441, 448 (4th Cir. 1981); *see also Rollins, supra*, 868 F.2d at 401.

(3) **The Individual Defendants.** The Plaintiff has also sued defendants John Martin, Earl Smith, Dan Simple, and Rachael Booker in their individual capacities under Title VII. However, Title VII does not provide a cause of action against individual defendants, but only against "employers." *Cross v. Alabama, State Dept. of Mental Health & Mental Retardation,* 49 F.3d 1490, 1504 (11th Cir. 1995); *Busby v. CLW of Orlando,* 931 F.2d 764, 772 (11th Cir. 1991) ("Individual capacity suits under Title VII are . . . inappropriate."). Even though the Eleventh Circuit has held that district courts should not grant summary judgment *sua sponte* without notice [*see Lindsey v. United States Bureau of Prisons, United States Dep't of Justice,* 736 F.2d 1462, 1463 (11th Cir.), *vacated and remanded for other reasons,* 469 U.S. 1082, 105 S.Ct. 584 83 L.Ed.2d 695 (1984); *Milburn v. United States,* 734 F.2d 762, 765-66 (11th Cir 1984)], there is no legal or factual basis for Title VII claims against these defendants. The plaintiff simply cannot present any evidence to support such claims. Therefore these defendants are entitled to summary judgment.

III. CONCLUSION

For the reasons discussed above, there are no genuine issues of material fact and Defendant UWF is entitled to judgment as a matter of law. The motion for summary judgment is GRANTED. Further, because the Plaintiff is suing the individual defendants under Title VII, which provides liability only against "employers," the individual defendants also are entitled to summary judgment as a matter of law. The Clerk shall enter judgment for all defendants and against the plaintiff, together with taxable costs.

DONE AND ORDERED this 22nd day of October, 1996.

ROGER VINSON
United States District Judge

APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT FILED OCTOBER 31, 1997

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 96-3664
Non-Argument Calendar

D.C. Docket No. 95-CV-30274/RV

JAMES HAWTHORNE,

Plaintiff-Appellant,

versus

UNIVERSITY OF WEST FLORIDA, FLORIDA BOARD OF REGENTS, General Counsel, JOHN MARTIN, EARL SMITH, DAN SIMPLE, RACHAEL BOOKER,

Defendants-Appellees.

THE FLORIDA DEPARTMENT OF INSURANCE, Division of Risk Management,

Defendant.

Appeal from the United States District Court
for the Northern District of Florida

(October 31, 1997)

Appendix B

Before TJOFLAT, COX and CARNES, Circuit Judges.

PER CURIAM:

James E. Hawthorne appeals the district court's order granting the defendant's motion for summary judgment in Hawthorne's employment discrimination action. Having reviewed the briefs and the pertinent part of the record on appeal, we conclude that the district court properly entered summary judgment against Hawthorne.

AFFIRMED.

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* All of appellant's outstanding motions are DENIED. Appellee's motion to strike appellant's brief is GRANTED as to Issues 2 and 3 of that brief. Appellee's motion to strike supplemental correspondence is DENIED as moot.